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164-705

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TRANSCRIPT OF RECORD.

164-705

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

DECEMBER TERM, 1895.

No. 708.

PRENTISS D. CHENEY, APPELLANT,

vs.

JOHN S. BILBY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 2, 1895.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1895, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, to wit, the second day of December A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, Circuit Judges.

United States Circuit Court of Appeals, Eighth Circuit.

Attest:
JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered, that heretofore, to wit, on the second day of September, A. D. 1895, a transcript of record, in pursuance of an appeal allowed by the Circuit Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in the case of Prentiss D. Cheney, Appellant vs. John S. Bilby, Appellee, which said transcript of record is in the words and figures following, to wit:

1 Pleas before the Honorable John A. Riner, Judge of the District Court of the United States for the District of Wyoming, sitting by assignment in the Circuit Court of the United States for the District of Nebraska, within the Eighth Judicial Circuit, at the term of May, A. D. 1895.

Be it remembered, that on the 2nd day of December, 1892, a Bill of Complaint was filed in the office of the Clerk of said Circuit Court, which said Bill of Complaint is in the words and figures following, to-wit:

In the Circuit Court of the United States in and for the District of Nebraska.

BILL OF COMPLAINT IN EQUITY.

John S. Bilby, Complainant,

vs.

Prentiss D. Cheney, Respondent.

To the Honorable, the Judges of the Circuit Court of the United States, in and for the District of Nebraska.

John S. Bilby, a citizen and resident of Quitman, in the State of Missouri, brings this Bill of Complaint against Prentiss D. Cheney, a citizen and resident of Jerseyville, in the State of Illinois.

And you- orator complains and alleges that the matters in controversy exceed in value the sum of Twenty Thousand ($20.000.00) dollars, exclusive of costs and interest.

2nd. Your orator further complains and alleges that heretofore and on the second day of May, in the year Eighteen Hundred and Eighty-one, (1881), the said respondent, Prentiss D. Cheney, entered into a certain written contract with John A. Wisherd, whereby for a certain valuable consideration alleged and set forth in said contract, the same to be
2 made in payments as therein set forth in said contract. The said respondent agreed to sell to the said John A. Wisherd certain real estate situated in Gage County and State of Nebraska; more particularly described as follows: All of section one, township five (5) range seven (7) east being

646-28/100 acres. All section twenty-four (24) town six (6) range seven (7) being 640 acres. All section nine (9) town six (6) range eight (8) being 640 acres. North-east quarter section five (5) town five (5) range eight (8) being 164-42/100 acres, and the fractional west half of section six (6) township five (5) range eight (8) being 124-51/100 acres, in all a total number of Twenty-two hundred Fifteen and 21/100 acres.

The purchase price agreed upon between the said respondent and the said John A. Wisherd as set forth in said contract of sale, was the sum of fifteen Thousand Five Hundred-six and 47/100 ($15,506.47) dollars, of which Four Hundred Twelve and 55/100 ($412.55) dollars was paid at the time of the making of said contract.

Your orator further represents that the remainder of the purchase price—by the terms of said contract, was to be made in payments. These payments were evidenced by certain promissory notes of the said John A. Wisherd given to the respondent. The first one of $1886.73 was due May 2nd, 1884; the second one for $1886.73 was due May 2nd, 1885; the third one for $1886.73 was due May 2nd, 1886; and five other notes each for $1886.73, and each due in six, seven, eight, nine and ten years after date, which eight notes were the principal notes, and the said Wisherd further agreed by the terms of the said contract to pay six per cent interest on said purchase price of said land. Said interest was to be paid in installments each year during the ten years for which said contract was to run; and the said interest payments were evidenced by certain other promissory notes of the said Wisherd, payable to the said Cheney as follows: First note $905.63, second note $905.63, third note $905.63, [foruth] note
3 $792.43, fifth note $679.23. sixth note $566.03, seventh note $452.83, eighth note $339.63, ninth note $226.43, tenth note $113.23. The said notes severally be-came due consecutively in one, two, three, four, five, six, seven, eight, nine and ten years from their date, and they were all dated May 2nd, 1881.

Your orator further represents that all of said notes, both principal and interest, were made payable at the office of Russell & Holmes, at Tecumseh, Nebraska. The said several principal and interest notes did not draw interest before maturity, but each note provided that it should draw interest after maturity at the rate of ten per cent.

Your orator further alleges that said contract of sale and purchase of said premises further provided that said Wisherd should make certain improvements on said premises, and

that in case the said Wisherd should make his payments in accordance wth the stipulations of said contract, that at the end of the last payment the said respondent Prentiss D. Cheney, should make the said Wisherd a good and sufficient Warranty deed, conveying to the said Wisherd the title in fee-simple of the premises hereinbefore described.

Your orator attaches a true copy of said contract of purchase to his bill of complaint, and the same is marked "Exhibit A."

Your orator further presents that in accordance with the stipulations and agreements set forth in said contract of the said John A. Wisherd, took immediate possession of said premises and made lasting and valuable improvements on the same of the value of Twenty Thousand ($20,000.00) dollars, and in all respects fully complied with the requirements of said contract in the improvement of said land.

Your orator further represents that at the several times the said notes fell due, the said Wisherd up to the ones falling due on the ———— day of ———— 188—, went to the place where said notes were payable, at the office of Russell & Holmes, Tecumseh, and offered to pay each of said notes and made profert of all of the money due thereon to the said Russell & Holmes, as the agents of the said Cheney, and offered the money, which was in legal tender of the United States, to them, in payment thereof.

4

The said Wisherd was each time informed by said Russell & Holmes, that the said notes given by the said Wisherd to the said Cheney, that were then due, were not in their possession, and that they had no authority to take the said money due thereon. The said Wisherd then and there notified the said Russell & Holmes that the said money so tendered would thereafter at all times be kept at the First National Bank of Lincoln, Nebraska, for the payment of said notes, and that said Cheney could obtain the said money by the surrender of said notes there to said last mentioned bank.

Your orator further represents that on the 13th day of February, 1889, your orator for a valuable consideration purchased the said equity of the said Wisherd in said land and obtained a quit-claim deed therefor, and also an assignment of the said contract from the said Wisherd, and undertook and agreed to perform all and singular the obligations and payments of the money due the said Cheney from the said Wisherd under said contract of purchase.

Your orator further represents that, after said last mentioned date at the time the succeeding notes fell due, and as

they fell due, he took the money, not only the amount that then fell due, but all the money that was past due, and went to the office of Russell & Holmes, Tecumseh, Nebraska, and offered the same to said Russell & Holmes in payment of the notes that were due and past due, and still the said Russell & Holmes refused to take the same in payment of said notes, at the same time alleging the said notes were not in their possession and that they did not have authority to receive the said money.

Your orator further represents that, at each time the said money was offered to the said Russell & Holmes in payment of the notes that were due and past due, and the same was refused by the said Russell & Holmes, your orator notified the said Russell & Holmes that said tender of money would be kept good at all times for the payment of said notes due, and past due, at the First National Bank of Lincoln, Nebraska, and that the said Cheney could obtain the same by producing the said notes to the First National Bank of Lincoln, Nebraska, for payment.

Your orator further represents that on the 5th day of May, 1891, the date of the last payment, your orator took with him to the office of Russell & Holmes, Tecumseh, Nebraska, from the said First National Bank of Lincoln, Nebraska, the said money that had been kept there as a tender in payment of the said notes past due, and also sufficient in addition to meet the last notes due the said Cheney on said contract, and offered the same to the said Russell & Holmes for said Cheney in satisfaction of the whole of said indebtedness, but still the said Russell & Holmes refused to accept said money, and stating to your orator that they had not the notes and they were not in their possession. Your orator thereupon notified the said Russell & Holmes that said money would be kept at all times at the said First National Bank of Lincoln, Nebraska, ready to pay all of said indebtedness due under said contract, and the same has been so kept at said First National at all times subsequent to said several offers of payment ready for the payment of said notes and indebtedness.

Your orator further represents that he is now the owner of said equity and of all of rights and interest so assigned by said Wisherd under said contract, and has been since the 13th day of February, 1889.

Your orator further represents that notwithstanding he has been ready at all times to pay the money due on said contract, and has at great expense kept the money and said tender good to pay all of said notes, the said Cheney has refused to

produce said notes and receive the money for them, or
6 to make your orator a deed of said land.

Your orator further represents that said Cheney brought a suit in ejectment in the Circuit Court of the United States for the District of Nebraska, against the said Wisherd in the year, 1884, to gain possession of said premises, claiming the forfeiture of said contract of sale by the said Wisherd, and the same was tried to a jury and a verdict was returned in favor of said Wisherd in said case and judgment was rendered upon said verdict on the 5th day of February, 1887, against the said Cheney and in favor of said Wisherd dismissing said case out of said Court, which judgment is still of full force and effect.

Your orator further represents that several actions at law in the nature of ejectment brought by the said Prentiss D. Cheney for the purpose of gaining possession of said premises are now pending in the Circuit Court of the United States for the District of Nebraska. Said actions are more particularly described as follows: One of Prentiss D. Cheney-versus-John A. Wisherd and Samuel O. Wisherd, to recover section twenty-four (24) town six (6) range seven (7), one against John A. Wisherd and Wiliam Long to recover possession of section nine (9) town six (6) range eight (8) east, one against John A. Wisherd to recover possession of section one (1) township five (5) range seven (7) east, and the fractional west-half of section six (6) town five (5) range seven (7) east, one against John A. Wisherd and Richard Bowman to recover possession of the north-east quarter of section five (5) in township five (5) range seven (7) east.

Your orator represents that said actions at law were commenced in said Court on the 29th day of May, 1891; and are now pending in said Court.

Your orator further represents that at the time of the commencement of said several actions, your orator was, by his tenants in the possession of all of said land and that the said
several defendants in said actions at law, were the
7 tenants of your orator, except the said defendant, John
A. Wisherd, who had no possession of any of said premises, but the premises alleged to be in the possession of the said John A. Wisherd at the commencement of said law actions were in the possession of your orator.

Your orator avers that he is entitled to a deed to said land from the said Prentiss D. Cheney, that he is now willing and offers to bring into your honorable Court as your Court may direct, all moneys due the said Cheney by said contract and

notes, and offers to do equity in every respect as to this honorable Court shall seem just.

Your orator further represents that said actions at law are brought for the purpose of annoying your orator, and your orator represents that he is unable to gain relief in said actions at law unless your honorable Court grants an order of injunction restraining the said Cheney from proceeding with said actions at law, until a determination of this suit in equity, and in case your orator prevails herein a perpetual injunction should be granted restraining the further prosecution of said suits at law.

Your orator therefore prays that your honorable Court may issue your most gracious writ of Subpoena in Chancery against the said defendant Prentiss D. Cheney, commanding him to appear before this Court and make answer to this your orator's bill of complaint, but your orator waives oath thereto, that an order of injunction may issue restraining said defendant Prentiss D. Cheney from proceeding in said actions at law until the determination of this suit, and upon the final hearing thereof, said injunction may be made perpetual.

Your orator further prays that the said defendant Cheney be ordered to make your orator a good and sufficient warranty deed to the premises in controversy, and for such other and further relief as in equity may be just and right and for the costs of this suit.

LAKE, HAMILTON & MAXWELL, &
8 ROBERT W. SABIN,
Solicitors for Complainant.

State of Nebraska,
County of Douglas.

John S. Bilby, being first duly sworn according to law deposes and says: that he is the complainant in the above entitled suit that he has read the foregoing bill and knows the contents thereof and that the facts therein set forth are true.

JOHN S. BILBY.

Subscribed in my presence and sworn to before me this 20th day of September, 1892.

[Seal] JAS. W. HAMILTON,
Notary Public.

Upon the back of said Bill of Complaint appear indorsements in the words and figures following, to-wit: Doc. P. No. 270. In the Circuit Court of the United States for the Dis-

trict of Nebraska. John S. Bilby, Complainant, vs. Prentiss D. Cheney, Defendant. Bill of Complaint. In Equity. Filed Dec. 2, 1892, Elmer D. Frank, Clerk. Lake, Hamilton & Maxwell and Robert W. Sabin, Solicitors for Complainant.

Thereupon afterwards, to-wit: at the November, 1892, term of said Court and on the 6th day of December, 1892, the following proceedings were had in said case as appears of record on folio 96 of Journal R. of said Court, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

ORDER ALLOWING INJUNCTION.

John S. Bilby Complainant,
270 P. vs.
Prentiss D. Cheney, Defendant.

This cause came on to be heard on the application of the Complainant, upon his Bill of Complaint duly verified, praying for a writ of injunction to restrain the defendant Prentiss D. Cheney, until the determination of this suit, from proceeding in several actions at law in the nature of ejectment brought by said Prentiss D. Cheney for the purpose of gaining possession of certain real estate situate in Gage County in the State of Nebraska, and now pending in the Circuit Court of the United States for the District of Nebraska, as follows, to-wit:

One Prentiss D. Cheney versus John A. Wisherd and Samuel O. Wisherd to recover section twenty-four (24) town six (6) range seven (7); one against John A. Wisherd and William Long to recover possession of section nine (9) town six (6) range eight (8) east; one against John A. Wisherd to recover possession of section one (1) in township five (5) range seven (7) east, and the fractional west half (W. 1/2) of section six (6) town five (5) range seven (7) east, and one against John A. Wisherd and Richard Bowman to recover the possession of the north-east quarter (N. E. 1/4) of section five (5) in township five (5) range seven (7) east, on consideration whereof and for good cause shown, it is ordered by the Court that a writ of injunction be and hereby is allowed and that until the hearing of this cause and the further order of the Court the said Prentiss D. Cheney be enjoined from further proceeding in or prosecuting said actions at law, or either of them, upon the said complainant giving a bond in the sum of five hundred dollars, conditioned as required by law.

ELMER S. DUNDY, Judge.

Thereupon afterwards, to-wit: on the 7th day of January, 1893, an Injunction Bond and justification were filed in said case, which said Injunction bond and justification are in the words and figures following, to-wit:

10 BOND FOR INJUNCTION.

Whereas in an action pending in the Circuit Court of the United States for the District of Nebraska, wherein John S. Bilby is complainant and Prentiss D. Cheney is defendant, the said complainant has obtained a writ of injunction against said defendant upon his giving a bond in the sum of Five Hundred ($500.00) dollars.

Now therefore, we, John S. Bilby, as principal and C. C. Clifton, as surety, do hereby undertake to the said Prentiss D. Cheney in the sum of Five Hundred ($500.00) dollars; that said John S. Bilby will pay to said Prentiss D. Cheney all damages which he may sustain by reason of said writ of injunction, if it should be finally decided that said writ of injunction ought not to have been granted.

Dated at Omaha, Nebraska, December 31st, 1892.

JOHN S. BILBY.
C. C. CLIFTON.

I hereby approve the above bond and the surety thereon this ..... day of ....., 189....

.....

Upon the back of said Bond appear indorsements in the words and figures following, to-wit: Doc. P. No. 270. In the Circuit Court of the United States for the District of Nebraska. John S. Bilby, vs. Prentiss D. Cheney. Bond for Injunction. Approved and filed Jan. 7, 1893. Elmer D. Frank, Clerk.

Attached to said Bond is Justification of Surety, which said Justification of Surety is in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

JUSTIFICATION.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, Defendant,

11 State of Nebraska,
Douglas County—ss.

C. C. Clifton being first duly sworn on my oath state that I am a resident of said Douglas County, and that I am worth

over and above all my indebtedness the sum of $1700.00 and that I own real estate in said County, not exempt from execution and aside from incumbrances, of the value of $1200. and that I own [persinal] property in said County, not exempt from execution, and aside from incumbrances of the value of $500.00, and further affiant saith not.

C. C. CLIFTON.

Subscribed in my presence and sworn to before me this 6th day of January, 1893.

[Seal] H. E. MAXWELL,
Notary Public.

Upon the back of said Justification of Surety appear indorsements in the words and figures following, to-wit: Doc. P. No. 270. In the Circuit Court of the United States for the District of Nebraska. John S. Bilby, vs. Prentiss D. Cheney. Justification. Filed Jan. 7, 1893, Elmer D. Frank, Clerk.

Thereupon afterwards, to-wit. on said 7th day of January, 1893, Subpoena in Chancery and an Injunction writ were issued in said case, neither of which said Subpoena in Chancery and Injunction writ, were returned and filed in said case.

Thereupon afterwards, to-wit: on the 16th day of March, 1894 an Interpleader of Susan B. Alden, Executrix, was filed in said case, which said Interpleader is in the words and figures following, to-wit:

12 In the Circuit Court of the United States for the District of Nebraska.

INTERPLEADER OF SUSAN B. ALDEN, EXECUTRIX OF THE ESTATE OF GEORGE C. ALDEN, DECEASED.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, Defendant.

To the Honorable, the Judges of the Circuit Court of the United States, within and for the District of Nebraska.

1. Susan B. Alden, complaining, shows to this Honorable Court that she is a resident of the State of Nebraska, and the said John S. Bilby, complainant in this case, is a resident and citizen of the State of Missouri; and that the said Prentiss D. Cheney, defendant in this case, is a resident and citizen of the State of Illinois.

2. Complainant further says that on March 24th, 1890, she, as executrix of the estate of George C. Alden, deceased, and in an action upon a contract, obtained a judgment in the sum of

Twenty Thousand Five Hundred Sixty-five dollars and ninety cents, and costs in the sum of Seventy-four dollars and thirty-five cents, in the District Court of the First Judicial District of Nebraska, held in and for Gage County and the State aforesaid, against John A. Wisherd, with whom the defendant in this action entered into a certain written contract to sell to said John A. Wisherd the real estate described in defendant's answer in this case; that said executrix showeth to this Honorable Court, by a certified copy of the said judgment obtained in said District Court, that the same is true as herein alleged, and attaches a copy of transcript of said Court record in said case, which is marked exhibit "A;" that said judgment has not been appealed from, reversed or satisfied, and is a present and existing lien on said property, or on Wisherd's alleged interest therein.

3. And this complainant shows further to this Honorable Court that on March 24th, 1890, the said John A. Wisherd was the owner, and the title to the following land was in his name as follows, to-wit: All of section nine (9) township six
13 (6) range eight (8) east, all of section twenty-four (24) township six (6) range seven (7) east, all of section one (1) township five (5) range seven (7) east, also the west half of section six (6) township five (5) range eight (8) east, also the west half of the north west quarter of section three (3) township six (6) range eight (8) east, situated in Gage County, Nebraska. This complainant further says that while her said case was pending in the District Court of Gage County, Nebraska, and prior to judgment had therein, as shown per exhibit "A," attached to this petition, said John S. Bilby, complainant in this case, and the said John A. Wisherd, conspiring together for the express purpose of cheating and defrauding this answering complainant, says that a deed was made to the above described land by the said John A. Wisherd, a single man, to the said John S. Bilby, dated on February 13, 1889, and held by the said John A. Wisherd in his possession, and was not filed of record in the County of Gage, State of Nebraska, until the 18th day of February, 1890, and only a few days prior to the obtaining of the judgment by this answering complainant against the said John A. Wisherd, all of which the said John A. Wisherd and the said John S. Bilby were well acquainted with the facts and circumstances surrounding the case; that said deed was made out only a few days before said judgment was obtained and that the deed aforesaid was dated back, and the date thereof does [nor] correspond with the date upon which said deed was executed.

4. And the complainant further shows that she has often demanded of said John A. Wisherd the payment of the said

judgment, which she is lawfully entitled to receive and that said judgment nor no part thereof has been paid.

5. And this complainant further shows that some time after the judgment was rendered, on or about the 22nd day of December, A. D. 1890, an execution issued out of the District Court aforesaid, and against the property of said John A. Wisherd, and that said execution was returned into
14 said Court without any property being found of the said John A. Wisherd upon which to levy the same, and that said judgment remains wholly unpaid.

6. And this complainant further shows to the Court that she doth not in any respect collude with either the said John S. Bilby or said Prentiss D. Cheney, or said John A. Wisherd, touching the matters in question in this cause; that she hath not exhibited this bill at the request of such persons named or either of them, and that she has not been indemnified by any or either of said persons, but that this is merely of her own free will and for the purpose of setting up her said judgment rendered in the Court aforesaid and against the said John A. Wisherd and against the interests that the said John A. Wisherd may be adjudged to have touching the matters contained in the bill filed in this case.

This complainant prays this Honorable Court that she as executrix of the estate of George C. Alden, deceased, by paying the necessary sum of money into Court, be allowed according to the course of this Court, to interplead and to become a party plaintiff to this action and for the purpose of setting up said judgment against such interest as this Court shall adjudge said John A. Wisherd has in the said land described in complainant's petition filed in this case.

SUSAN B. ALDEN,
Executrix of the Estate of George C. Alden, deceased.

By ALFRED HAZLETT, her attorney.

AFFIDAVIT.

State of Colorado,
Laramie County—ss.

Susan being first duly sworn upon her oath says she is the executrix of the estate of George C. Alden, deceased, and that she as such executrix, obtained a judgment against John A. Wisherd and S. O. Wished in the District Court of Gage County, Nebraska, at the time and in the sums desig-
15 nated and set out in her interpleader filed in this Court; affiant further states that she does not collude with either or any of the parties interested in this suit nor with the

said John A. Wisherd and S. O. Wisherd, but files this interpleader for the purposes expressed herein.

SUSAN B. ALDEN,
Executrix of the Estate of George C. Alden, deceased.

Subscribed and sworn to before me this 30th day of January, 1894.

[Seal.] JOHN W. McHENRY,
Notary Public.

My Commission expires, Feb'y. 7, 1897.

Exhibit "A" attached to said Interpleader, is in the words and figures following, to-wit:

EXHIBIT "A."

Pleas: In the District Court of the First Judicial District of Nebraska, in and for the County of Gage. At the February A. D. 1890 term of said Court, begun and held in the city of Beatrice, in said County and State, on the 17th day of February in the year of our Lord one thousand eight hundred and ninety, and on a day therein, to-wit: on the 24th day of March A. D. 1890, (That being the thirty-first judicial day of said February term of said Court.) Present Honorable J. H. Broady, Judge, presiding, W. R. Jones, Sheriff and F. H. Holt, clerk; the following proceedings were had and done, to-wit:

Susan B. Alden, Executrix of the Estate of George C. Alden, deceased.

vs.

John A. Wisherd and S. O. Wisherd.

Now on this 24th day of March, A. D. 1890, it being the thirty-first day of the term, this cause came on to be heard and the judgment heretofore entered in this case is hereby set aside and coming on further to be heard on motion for
16 new trial, and the Court being well advised in the premises, overrules said motion to which ruling of the Court the defendant excepts.

It is therefore considered, ordered and adjudged by the Court that the plaintiff have and recover of and from the defendants the sum of $20565.90 and the costs in this action taxed at $74.35.

Forty days allowed defendants from the rising of Court to reduce exceptions to writing.

CERTIFICATE.

State of Nebraska,
Gage County—ss.

I, R. W. Laflin, Clerk of the District Court of the First Judicial District of Nebraska, in and for said County, do hereby

certify that the above and foregoing is a true and correct copy of the judgment rendered by said Court on the 24th day of March, 1890, in a cause therein, wherein Susan B. Alden, executrix of the estate of George C. Alden, deceased, was plaintiff, and John A. Wisherd and S. O. Wisherd were defendants as the same appears fully upon Court Journal "H" at page 406, of the records of said Court and now in my charge remaining as Clerk aforesaid.

In testimony whereof, I have hereunto set my hand officially and attached the seal of said Court, at Beatrice, this 27 day of December, 1893.

[Seal.] R. W. LAFLIN, Clerk.
By ORLANDO SWAIN, Deputy.

Upon the back of said Interpleader of Susan B. Alden, Executrix, appear indorsements in the words and figures following, to-wit: No. 270 P. In the Circuit Court of the United States for the District of Nebraska. John S. Bilby, complainant, vs. Prentiss D. Cheney, deft. Interpleader of Susan B. Alden, Executrix. Filed Mar. 16, 1894. Elmer D. Frank, Clerk. Alfred Hazlett, Atty. for Mrs. Alden. 16 March, 1894. Leave is given to intervene and [filed] this bill. Elmer
17 S. Dundy, Judge.

Thereupon afterwards, to-wit: on the 20th day of March, 1894 an Answer in Equity was filed in said case, which said Answer is in the word- and figures following, to-wit:

In the Circuit Court of the United States, for the District of Nebraska.

ANSWER IN EQUITY OF THE DEFENDANT, PRENTISS D. CHENEY.

John S. Bilby, Complainant,

vs.

Prentiss D. Cheney, Defendant.

To the Honorable the Judges of the Circuit Court of the United States, within and for the District of Nebraska.

1. This defendant now and at all times hereinafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much of said parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant answering sayeth, that he denies each and every

allegation in said complainant's bill of complaint set forth excepting such as are hereinafter expressly admitted to be true.

This defendant admits that the complainant John S. Bilby is a citizen and resident of Quitman in the State of Missouri, and that this defendant Prentiss D. Cheney is a citizen and resident of Jerseyville in the State of Illinois. Admits that the matters in controversy exceed in value the sum of Twenty thousand ($20,000.) dollars, exclusive of interest and costs. This defendant admits that heretofore and on or about the 2nd day of May in the year 1881, the said respondent Prentiss D. Cheney entered into a certain written contract with one John A. Wisherd.

18 2. This respondent further answering alleges that on or about the 2nd day of May, 1881, this respondent entered into a certain written contract with one John A. Wisherd, whereby for a valuable consideration and the performance of certain conditions and covenants set forth in said contract and certain payments of money to be made as therein set forth, this said respondent agreed to sell to said John A. Wisherd certain real estate situate in Gage County in the State of Nebraska, more particularly described as follows, to-wit:

All of section one, town five, range seven being..	646.28
All of section twenty-four, town six, range seven being	640.
All of section nine, town six, range eight being...	640.
North east quarter section five, town five, range seven being.....	164.42
And the fractional west half of section six, town five, range eight, being	124.51
In acres a total of	2215.21

acres. That a copy of said written contract so entered into by and between this respondent and said John A. Wisherd is hereto attached and marked exhibit "A" and made a part hereof and permission asked to refer thereto.

3. That by the terms and conditions of said contract, said John A. Wisherd agreed and obligated himself to pay to this respondent Prentiss D. Cheney the sum of Fifteen Thousand dollars ($15,000.) in annual payments of $1886.73 each, all of which payments were evidenced by eight certain promissory notes of even date with said contract and bearing interest at the rate of ten per cent. per annum after maturity, made, executed and delivered by said John A. Wisherd to said Prentiss D. Cheney at the time of the execution and delivery of said contract, the first of said payments falling due three years from date and one of said notes maturing each year thereafter for a period of eight years inclusive of the first note.

19 That by the terms and conditions of said contract the said John A. Wisherd further agreed to pay to this respondent, Prentiss D. Cheney, as interest on said $15,000. the following sums of money at the times specified.

$905.63	May	2—5th,	1882.
$905.63	"	"	1883.
$905.63	"	"	1884.
$792.43	"	"	1885.
$679.23	"	"	1886.
$566.03	"	"	1887.
$452.83	"	"	1888.
$339.63	"	"	1889.
$226.48	"	"	1890.
$113.23	"	"	1891.

That said payments so contracted for and agreed upon were further evidenced by ten certain promissory notes of even date with said contract, made, executed and delivered by said John A. Wisherd to this respondent Prentiss D. Cheney, and due one, two, three, four, five, six, seven, eight, nine, and ten years from date and bearing interest at the rate of ten per cent. per annum from maturity.

That the said John A. Wisherd has defaulted and failed to perform the terms, conditions and obligations of said contract on his part to be done and performed in this, that he has neglected, failed and refused to make or pay the following payments required by the terms of said contract:

$1886.73	due	May	2—5,	1891.
$113.23	"	"	"	1891.
$1886.73	"	"	"	1890.
$226.43	"	"	"	1890.
$1886.73	"	"	"	1889.
$339.63	"	"	"	1889.
20 $1886.73	due	May	2—5,	1888.
$452.63	"	"	"	1888.
$1886.73	"	"	"	1887.
$566.03	"	"	"	1887.
$1886.73	"	"	"	1886.
$679.23	"	"	"	1886.
$1886.73	"	"	"	1885.
$792.43	"	"	"	1885.
$1886.73	"	"	"	1884.
$905.63	"	"	"	1884.

That by reason of said defaults said contract became forfeited, null and void at the option of this respondent, Prentiss D. Cheney.

4. That immediately after each default in said payments by said John A. Wisherd, this respondent notified the said Wish-

erd that he elected to declare said contract void and did declare said contract forfeited and void and tendered back and returned to said Wisherd his said contract and the unpaid notes of the said Wisherd evidencing the payments to be made on said contract. That this respondent does now declare said contract forfeited, null and void.

5. This respondent further answering the complainant's said bill alleges that the pretended tenders of money in alleged compliance with the terms and conditions of said contract were not in good faith and were not bona fide tenders, but if any were made they were in furtherance of the conspiracy between the said complainant and the said John A. Wisherd, which said conspiracy had for its object and was intended to cheat, swindle, defraud and deceive this respondent.

6. This respondent further answering said complainant's said bill alleges that the complainant ought not to have and maintain this action for the reason that the complainant is without right or title either legal or equitable in and to the premises in controversy for the reason that heretofore and on or about the 24th day of March, A. D. 1890, one Susan B. Alden, executrix of the estate of George C. Alden, deceased, recovered a judgment against said John A. Wisherd and one S. O. Wisherd duly given by the District Court of the
21 First Judicial District of Nebraska, held in and for Gage County, for the sum of $20,565.90 and $48.80 costs of suit in an action then pending in said Court in favor of the said Susan B. Alden, executrix of the estate of George C. Alden, deceased.

That said judgment is now in full force, unsatisfied and unappealed from and is a first and prior lien on said premises, if the said John A. Wisherd or S. O. Wisherd, either or both, or if the said complainant herein John S. Bilby have any right, title or interest in and to the premises involved in this controversy.

That the said Susan B. Alden, executrix, as aforesaid, has caused execution to be issued on said judgment and levied on said land and claims said property as subject to said execution.

7. That said pretended conveyance of the said contract from the said John A. Wisherd to the said John S. Bilby if any such was made or attempted to be made, was done for the purpose and with the intent and in pursuance of a conspiracy to cheat, swindle and defraud the creditors of the said John A. Wisherd and more especially to cheat, swindle and defraud this respondent and to hinder and delay this respondent from the collection of his debts and the enforcement of his rights in the premises.

8. That by the terms and conditions of said contract hereto attached and marked exhibit "A" the said John A. Wisherd party of the second part agreed to regularly and seasonably pay all the taxes and assessments against said land, and to pay the taxes of 1881 and all subsequent years. And it was provided in said contract and agreement that in case the said Wisherd the party of the second part should fail to pay the taxes or if the land should be sold for taxes then said contract should become null and void and all the rights and interest thereby created or then existing in favor of the said second party or derived from him, shall utterly cease and determine and the right of possession and all equitable and legal
22 interests in the premises shall revert to and revest in said first party, to-wit: this respondent, without any declaration, forfeiture or act of re-entry or any other act of the said first party to be performed and without any right of said second party or re-clamation of compensation. That in violation of said provisions of said contract the said Wisherd and said Bilby allowed said land to be sold for taxes on the 6th day of November, 1893, at which time the said premises were duly sold for taxes for the years 1891 and 1892, as follows, to-wit:

All of section 1, town 5, range 7, was sold to C. H. Moore at said time for the taxes of 1892, amounting to $105.32.

That all of section 24, town 6, range 7, was at said time duly sold for taxes of the year 1893, amounting to $102.20, to one W. J. Whiffin.

That all of section 9, town 6, range 8 were at said time duly sold to C. H. Moore, for taxes for the year 1892, amounting to $142.60.

That the north east quarter of section 5, town 5, range 7, was at that time duly sold to one W. J. Whiffin, for taxes for the years 1891 and 1892, amounting to $62.25.

That the fractional west half of section 6, town 5, range 8, was at the time duly sold to C. H. Moore for taxes for the year 1892, amounting to $25.20.

And this respondent alleges that by reason of said failure to comply with said terms and said conditions of said contract, said contract has become null and void and without force or effect as against this respondent.

9. This respondent further answering said complainant's said bill alleges that all of said facts hereinbefore set forth regarding the conditions of said contract between this respondent and the said Wisherd and also the default made by the said Wisherd in the payments required by said contract and

the forfeiting of said contract and the election and de-
23 claring of said contract forfeited, null and void by this
respondent, and the tendering and giving back to said Wisherd of his said notes and said contract and relieving him from obligation thereunder, were well and truly known to the complainant John S. Bilby for a long time prior to the pretended purchase by him and the assignment of said contract and of the pretended purchase by him of the alleged interest of the said John A. Wisherd in said land, and were well and fully known by said John S. Bilby long prior to the 13th day of February, 1889.

And your respondent further alleges that by reason of such knowledge the said John S. Bilby complainant is estopped and ought not to have and maintain his alleged cause of action in his said bill of complaint set forth and by reason of such estoppel is not entitled to the relief prayed for in his said bill of complaint.

10. This respondent further answering the bill of complaint herein alleges that by the terms and conditions of said contract between this respondent and the said Wisherd it was stipulated that no assignment of the premises or of the said contract should be valid unless with the written consent of the first party, which said first party was the respondent herein, the said Prentiss D. Cheney, and by indorsement of the assignment on said contract. And this respondent alleges that he has never at any time consented to the assignment of the premises or of said contract to the said complainant John S. Bilby or any other person, and that if said contract has been assigned or the said Wisherd's rights thereunder by the said John A. Wisherd to the said John S. Bilby or other person, it has been without the consent of this respondent.

11. This respondent further answering says that said pretended sale and assignment of said premises and contract hereinbefore referred to and the alleged rights of the said John A. Wisherd thereunder and thereto were made for the express purpose of cheating, swindling, hindering and delaying the creditors of the said John A. Wisherd in the col-
24 lection of their debts due from the said John A. Wisherd, and more especially to cheat, swindle and defraud this respondent and hinder and delay this respondent from securing the possession of said premises, and that said pretended sale and conveyances were a fraud and null and void, all of which was well and truly known to said John S. Bilby at the time and long prior to said pretended sale, assignment and transfer and the said John S. Bilby was a party to and knowingly participated in said fraud and fraudulent conveyance, and that the same was attempted in furtherance of a conspir-

acy to cheat, swindle and defraud this respondent, which said conspiracy was well known to and participated in by said John S. Bilby, complainant.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause or thing in said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays that said contract shall be declared forfeited, null and void, and that the respondent be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

PRENTISS D. CHENEY.
By CHAS. E. MAGOON, his Solicitor.

Upon the back of said Answer appear indorsements in the words and figures following, to-wit: No. 270 P. John S. Bilby, versus Prentis D. Cheney. Answer in Equity. Filed Mar. 20, 1894. Elmer D. Frank, Clerk. Chas. E. Magoon, Solicitor.

25 Thereupon afterwards, to-wit: at the May term of said Court, and on 31st day of July, 1894, the following proceedings were had and done in said case as appears of record on folio 70 of Journal T of said Court, to-wit:

John S. Bilby,
No. 270 P. vs.
Prentiss D. Cheney.

On motion of complainant, by his solicitor, leave is hereby granted by the Court to file replication herein, instanter, which is done.

26 Thereupon afterwards, to-wit: on said 31st day of July, 1894, a Replication was filed in said case, which said Replication is in the words and figures following, to-wit:

In the Circuit Court of the United States, in and for the District of Nebraska.

IN EQUITY.

John S. Bilby, Complainant,
No. 270. Doc. P. vs.
Prentiss D. Cheney, Defendant.

The replication of John S. Bilby, complainant, to the answer of Prentiss D. Cheney, defendant.

This repliant saving and reserving unto himself now and at all times hereafter, all, and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver, maintain and prove his said Bill of Complaint to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently relied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is, and will be ready to aver, maintain and prove, as this honorable Court shall direct, and humbly prays as in and by his said Bill of Complaint he has already prayed.

SABIN & LAKE,
HAMILTON & MAXWELL,
Solicitors for Plaintiff.

Upon the back of said Replication appear indorsements in the words and figures following, to-wit: No. 270. Doc. P. U. S. Circuit Court, District of Nebraska. In Equity. 27 John S. Bilby, vs. Prentiss D. Cheney. Replication. Filed Jul. 31, 1894. Elmer D. Frank, Clerk. Sabin & Lake. Hamilton & M. Solicitors for Plaintiff.

Thereupon afterwards, to-wit: on the 12th day of November, 1894, a Motion to dismiss was filed in said case, which said Motion is in the words and figures following, to-wit:

In the Circuit Court of the United States, for the 8th Judicial District in and for the State of Nebraska.

MOTION TO DISMISS.

Bilby,
270 P. Equity. vs.
Prentiss D. Cheney.

Comes now the defendant, Prentiss D. Cheney, and moves the Court to dismiss this action, for the want of prosecution thereof by the complainant.

CHAS. E. MAGOON,
Sol. for defendant Cheney.

Upon the back of said Motion to Dismiss appear indorsements in the words and figures following, to-wit: No. 270. Doc. P. Bilby vs. Cheney. Motion to Dismiss. Filed Nov. 12, 1894. Elmer D. Frank, Clerk. Chas. E. Magoon.

28 Thereupon afterwards, to-wit: on the 30th day of November, 1894, Depositions on behalf of complainant were filed in said case which said Depositions are in the words and figures following, to-wit:

In the Circuit Court of the United States, Judicial District of Nebraska.

NOTICE TO TAKE DEPOSITIONS.

John S. Bilby, Complainant,

vs.

Prentiss D. Cheney, and Susan B. Alden, Executrix, Respondents.

The above named respondents will take notice, that on Tuesday the 27th day of November, 1894, the said complainant will take the Depositions of Charles A. Holmes, sundry witnesses, to be used as evidence on the trial of the above entitled cause, at the office of the Clerk of the District Court in the City of Tecumseh, County of Johnson and State of Nebraska, between the hours of nine A. M. and six P. M. of said day, and the taking of said Depositions will be adjourned from day to day, between the same hours, until they are completed.

LAKE, HAMILTON & MAXWELL and R. W. SABIN,
Attorneys for Complainant.

Received copy of the above notice this 22nd day of November, A. D. 1894.

CHAS. E. MAGOON,
Attorney for Respondent Prentiss D. Cheney.

A. HAZLETT,
Attorney for Susan B. Alden, Admx., Respondent.

Deposition of witness taken before me Corydon Rood, a notary public, within and for the County of Johnson, in the State of Nebraska, on the 27th day of November, in the year 1894, between the hours of nine A. M. and six P. M. at Tecumseh, in said County, pursuant to the annexed notice to be read in evidence in behalf of the complainant in an action pending in the Circuit Court of the United States for the Dis-
29 trict of Nebraska, in which John S. Bilby is complainant and Prentiss D. Cheney and Susan B. Alden, executrix, interpleader, respondents.

Charles A. Holmes, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Examined

By R. W. Sabin:

1 Q. State you name, place of residence and occupation and age?

Charles A. Holmes, North Enid, Ok. Ter. practicing law, 54 years of age.

2 Q. How long have you lived in North Enid?

Since Sept. 16, 1893.

3 Q. Where was your residence prior to that time?

Tecumseh, Nebraska. From the fall of 1871, until I moved to Ok. Ter.

4 Q. What was your business in Tecumseh, at the time you were living there?

I was one of the firm of Ruseel & Holmes, bankers, from Sept. 1871, until June, 1889. Vice-president of the bank of Russell & Holmes, from June, 1889, until April, 1890. President of the Tecumseh National Bank, from April 1890, until Oct. 1892. From that time until Sept, 1893, I was not engaged in any kind of business.

5 Q. Where was the banking house located?

Tecumseh, Nebraska.

6 Q. You can state whether or not the Tecumseh, National Bank was the successor to the bank of Russell & Holmes?

Obj. by respondent Cheney as irrelevant and immaterial, incompetent.

It was.

7 Q. In what place located?

In the same building where the bank of Russell & Holmes was.

8 Q. State whether you are acquainted with the plaintiff and respondent Prentiss D. Cheney?

Yes, sir.

30 9 Q. How long have you known them?

My acquaintance with Mr. Bilby is slight. Have met him ocassionally, during the past seven or eight years. Have known Mr. Cheney, perhaps, 18 or 20 years.

10 Q. You can state whether Mr. Cheney did his business, that is, his banking business, through your bank or the bank of Russell & Holmes, during its existence or a large portion of it that was done here by him during that time?

Mr. Cheney has done business with the bank of Russell & Holmes for a good many years, am not able to say when the business first commenced. Collections were made for him and during a greater portion of the time he had an account with that bank.

11 Q. You can state Mr. Holmes, whether you had anything to do with or was cognizant of the land deal between Prentiss

D. Cheney and John A. Wisherd? Land located in Gage County, Nebraska. And if so, when did you first know anything of the transaction?

I knew there was a contract between the parties for certain land in Gage County, Nebraska. I think I—I first knew about it in '82 or '83.

12 Q. You can state how you knew it and if you had anything to do with the col-ections in relation to it, and, if so, when was the first, if you remember?

Respondent Cheney obj. as incompetent, immaterial and irrelevant. No foundation laid for its introduction.

My first recollection is that Mr. Wisherd, or some one for him, called at the bank to pay a note given by Wisherd to Mr. Cheney in this transaction.

Respondent Cheney obj. to foregoing answer, and moves to have it excluded for the reason it states the contents and effects of a written instrument.

I think this was in 1882, possibly it was in 1883.

13 Q. Do you know what was done with the note?

31 Respondent Cheney obj. as incompetent, immaterial and irrelevant.

My recollection is that the bank notified Mr. Cheney that Wisherd had left money to pay a certain note and requested Mr. Cheney to send the note for collection. I think that note was sent to the bank, cancelled and delivered to Mr. Wisherd and the money sent to Mr. Cheney, or placed to his credit.

14 Q. Do you remember, Mr. Holmes, whether that was the first note that fell due?

I think the first note was due in 1882. I think that was the note.

15 Q. Do you remember about the payment of the next note?

Respondent Cheney obj. [—] incompetent, immaterial and irrelevant and no foundation laid.

I am not sure, not positive whether one or two notes were paid. My recollection is, that the notes due in 1882, and 1883, were both paid.

16 Q. During the year 1884. You can state whether the notes due that year, on the contract between Cheney and Wisherd, were sent to the bank, to your bank of Russell & Holmes for collection, at or before, or any time during that year?

Respondent Cheney obj. as incompetent, immaterial and irrelevant and no foundation laid for the introduction of such testimony.

My recollection is, that no notes, or none of the Wisherd notes, were sent to the bank in 1884.

17 Q. For collection?

For collection.

18 Q. You can state whether there were any notes given by John A. Wisherd to P. D. Cheney, sent to the bank of Russell & Holmes for collection or payment, during the year 1884?

To the best of my recollection, there were not.

19 Q. Do you remember John A. Wisherd, or any one for him, calling at your bank of Russell & Holmes, inquiring the notes or any notes were in the bank given by John
32 A. Wisherd to Cheney were there for payment?

Obj. to by respondent Cheney as leading, incompetent, immaterial and irrelevant.

I do not.

20 Q. Mr. Holmes, do you remember whether you were in the bank [of] the 5th day of May, 1884, in the fore part of the day, or in the fore part of the banking hours?

I could not say whether I was or not.

21 Q. Who else was connected with the bank, as one of the the officers of that bank, that had charge of the counter in your absence?

My brother W. H. Holmes, was the cashier at that time.

22 Q. You may state, Mr. Holmes, if you recognize that letter? (Handing witness letter.)

I do.

23 Q. You can state in whose handwriting that you know that letter is written in?

Mr. Cheney's handwriting.

24 Q. You can state if that letter was received by Russell & Holmes, and if so, about what date and in what way?

Received by mail on the 31st day of May, 1884, or possibly on the 30th.

25 Q. You can state, Mr. Holmes, whether at the receipt of this letter, the notes he speaks of that are past due in this letter, were in your bank for collection or payment?

Obj. to by respondent Cheney as incompetent, immaterial, irrelevant and leading.

I am quite sure they were not in the bank.

26 Q. Had they been up to that time?

Obj. to by respondent Cheney as incompetent, irrelevant and leading.

No, I think not.

Complainant's attorney offers this letter in evidence, marked Complainant's Exhibit "A," a copy of which is hereto
33 attached.

Respondent Chenet obj. to the letter as incompetent, immaterial and irrelevant and no foundation laid for its introduction, but waives obj. to use of copy instead of original, saving all objection which might or could be made to the original.

27 Q. You may state, Mr. Holmes, whether there was any note placed in the Bank of Rusell & Holmes for collection due from John A. Wisherd to P. D. Cheney and were in the bank during the month of May, 1885?

Obj. by respondent Cheney as incompetent, irrelevant and leading.

No, there was not, to the best of my recollection.

28 Q. State whether John A. Wisherd, or any one for him, called at the bank of Russell & Holmes, during the business hours, on, or about May 5th, 1885, and made any offers of payment of certain notes past due from Wisherd to Cheney upon this land contract? If so, please state what was done in that behalf?

Objected to by respondent Cheney [—] incompetent, immaterial, irrelevant and leading.

I do not recollect of Mr. Wisherd, or any one for him, calling at the bank, on, or about May 5th.

29 Q. You can state whether you have a recollection of his calling, or some one for him, a short time subsequent to that date, and, if so, state the date and what was done.

I remember that Mr. Wisherd called at the bank, sometime during the month of May, 1885, in reference to the note spoken of. By referring to the bank letter book I can fix the date and recall the transaction. On the 18th day of May, 1885, during banking hours Mr. Wisherd and another gentleman called at the bank of Russell & Holmes, inquired for the notes due May 2nd, 1885, and offered to pay them and made a tender to me as one of the officers of the bank of $5785 in payment of the notes due that month.

34 Respondent Cheney moves to exclude the answer of the witness after the words Russell & Holmes on the last line of 5, as being incompetent, immaterial and irrelevant.

30 Q. You may state, Mr. Holmes, in what kind of money, if you remember, that was?

A. It was gold coin and legal tender notes. Possibly all in gold coin.

31 Q. You can state, Mr. Holmes, if you remember whether or not you counted the money?

A. I did.

32 Q. State, Mr. Holmes, if there were any notes there past due owing Mr. Cheney from Mr. Wisherd at that time or any time during that month?

A. The notes were not there during that month.

33 Q. Have you—did you give Mr. Cheney any notice of that transaction?

Objected to by respondent Cheney as immaterial, incompetent, irrelevant and leading.

—If so state what it was?

Objection by respondent Cheney as immaterial, irrelevant and incompetent and leading.

A. I did. I wrote Mr. Cheney what had been done in the matter.

34 Q. What minutes have you showing the exact statements you made to Mr. Cheney?

A. I have a letter press copy of the letter written to Mr. Cheney on that day.

35 Q. What did you do with the letter?

A. Forwarded it to Mr. Cheney by mail on that day.

36 Q. Is the letter press copy you have a true copy of the letter you sent to Mr. Cheney on that day?

A. It is a true copy of the letter, which was in my handwriting.

37 Q. Is this you have in your hand the letter?

[—] It is.

35 Complainant's attorney offers this letter press copy in evidence, a copy of which is hereto attached and marked complainant's exhibit "B."

Respondent Cheney objects as immaterial, incompetent and irrelevant waiving the attaching of the letter press copy but saving all objections that might be made to the page of the letter book.

38 Q. You can state, Mr. Holmes, whether the instructions there were given in the letter by Mr. Wisherd is correct, if not, state anything else he said there at the time he made this tender?

Respondent Cheney objects as incompetent, immaterial and leading.

A. This letter states the instructions given by Mr. Wisherd to me at the time, and I have no recollection of any other conversation in relation to the matter.

39 Q. I see that you state that at that date Wisherd made a tender to the officers of the bank of $5785 in payment of the notes due that month. You can state whether the tender was made for the notes due that month, or whether it was for all moneys due Mr. Cheney from Mr. Wisherd up to that date?

Objected to by respondent Cheney as incompetent, immaterial and irrelevant, leading and no foundation laid for its introduction.

[—] The tender made by Mr. Wisherd was what he claimed was due Mr. Cheney on all the notes then due and unpaid. I—

40 Q. Were you present Mr. Holmes, the month of May, 1886, at the time that Mr. Wisherd by himself or some one for him, or with him, called at the bank and offered payment of the notes that he owed Cheney at that time?

Objected to by respondent Cheney as incompetent, immaterial, irrelevant and leading.

A. I think I was not. Cannot say positively.

41 Q. Have you any records of the bank that were made at that time by any officer of the bank setting forth any transaction of that kind?

A. I have a press copy of the letter. Written by W. H. Holmes, who was cashier of the bank.

36 42 Q. Of what bank?

A. Russell & Holmes.

43 Q. Will you please produce that letter?

[—] I now have a letter press copy of the letter.

Complainant offers letter press copy of the letter dated May 5, 1886, from Russell & Holmes to respondent P. D. Cheney. The same is attached hereto and marked complainant's Exhibit "C."

Respondent Cheney objects as immaterial, incompetent and irrelevant. Respondent waives attaching of letter press copy.

44 Q. You can state whether W. H. Holmes at that time had authority to write that letter and others of that character?

A. He had authority to write the letters and sign the firm name.

45 Q. Mr. Holmes, you can state what transaction you had, if any, with John A. Wisherd in regard to the indebtedness between him and P. D. Cheney on this contract in 1887?

Objected to by respondent Cheney as incompetent, immaterial and irrelevant. No foundation laid for its introduction and its not being binding upon Cheney.

A. I have no recollection of any transaction with Mr. Wisherd in May, 1887.

46 Q. You can state whether you had any transaction with any one in his behalf in regard to this indebtedness?

Objected to by respondent as incompetent, immaterial and irrelevant.

A. I had. On the 5th day of May, 1887, Oscar Callihan called at the bank and offered to pay the notes given by Wisherd to Mr. Cheney, then due and made a tender of $2452.76 in payment of the same.

Respondent moves to strike out the testimony of the witness relative to the tender as being incompetent, immaterial and irrelevant.

47 Q. You can state in what kind of money this tender was made in?

Objected to by respondent Cheney as incompetent, immaterial and irrelevant.

37 A. The tender was made in legal tender.

48 Q. You can state what kind of money as near as you can recollect?

A. My recollection is both gold coin, legal tender notes and silver.

49 Q. You say that it was then due or that fell due. Which do you mean?

Objected to by respondent Cheney as immaterial, incompetent and irrelevant.

A. Notes became due on the 2nd and 5th of May. The 5th was the last day of grace. 1887.

50 Q. You can state whether these notes were then in the possession of the bank?

A. They were not.

51 Q. You can state whether the notes of Mr. Wisherd were in the possession of the bank in May, 1886. That were due and past due?

A. My recollection is, they were not.

52 Q. Mr. Holmes, you can state whether Mr. Wisherd, or any one on his behalf, made any tender or offer of payment of his indebtedness on this contract to P. D. Cheney at your bank in the month of May 1888. If so, state what the transaction was.

Objected to by respondent Cheney as incompetent, immaterial, irrelevant and leading.

A. On the 4th day of May, 1888, a Mr. Chapman for Mr. Wisherd made a tender to the bank of Russell & Holmes of $2226.36 in legal tender notes and coin to pay notes given by Wisherd to P. D. Cheney and on the 6th day of the same month made a similar tender of the same amount of the same funds to pay the notes due at that time from Wisherd to Cheney. This tender was made to pay notes due May 2nd. and 5th. 1888.

53 Q. Have you or did you notify Mr. Cheney at that time in relation to the matter, if so, how did you notify him?

Objected to by respondent Cheney as leading, immaterial, irrelevant and incompetent.

A. I did notify Mr. Cheney by letter, dated May 8, 1888.

38 54 Q. Have you a letter press copy of that letter? If so, when was it made?

A. I have a letter press copy of the letter. It was made on May 8, 1888.

55 Q. Who by?

A. By myself.

56 Q. And this letter is in your handwriting?

A. It is. I now discover that the letter referred to was written May 8, 1889, and has reference to the tender made in 1889, and not to that made in 1888.

57 Q. And does your foregoing evidence in regard to the tender of payment in 1888, apply to the transaction of 1889?

A. It does.

58 Q. And the letter that you have identified is in regard to the transaction of 1889?

A. It is.

59 Q. Mr. Holmes, you may state whether Mr. Wisherd was present or whether the money was merely tendered to pay his notes that fell due at that time to Mr. Cheney?

Objected to by respondent Cheney as incompetent, immaterial, irrelevant and leading.

A. My recollection is, that Mr. Wisherd was not present at the time the tender was made in May 1889. The tender was made by Mr. Chapman to pay the notes that fell due in May, 1889.

60 Q. What bank was Mr. Chapman representing?

A. Mr. Chapman was a clerk in the First National Bank of Lincoln.

61 Q. Have you the letter written at that time to Mr. Cheney in regard to this transaction?

A. Yes sir, I have a letter press copy of it.

62 Q. Do you remember whether Mr. Chapman made a claim on whose behalf he was offering to pay the notes at that time?

A. No. I remember he asked for the Wisherd notes given to Cheney.

39 Complainant offers the letter press copy of the letter, dated May 8, 1889, a copy of which is hereto attached and marked complainant's Exhibit "D."

Respondent Cheney objects as incompetent, immaterial and irrelevant, waiving objection to copy of letter press copy, saving such objections as could be made to the letter itself.

63 Q. Mr. Holmes, you can state whether there was any tender or offer of payment on the part of Mr. Wisherd or any one for him of his indebtedness, or any part of the same, to Mr. Cheney through your bank. If so, state what it was. In the year 1888?

Objected to by respondent Cheney as immaterial, incompetent, irrelevant and leading.

A. There was. On the 5th day of May, 1888, tender was made by one P. S. Chapman of $2339.56 in gold and silver coin to pay the notes given by J. A. Wisherd to P. D. Cheney, due May 2nd. and 5th. 1888.

64 Q. Were those notes then in the possession of the bank of Russell & Holmes?

A. They were not.

65 Q. Did the bank of Russell & Holmes give Mr. Cheney any notice of this tender of payment, if so, state in what way?

Objected to by respondent Cheney as leading, incompetent, irrelevant and immaterial.

A. Mr. Cheney was notified by a letter dated May 5, 1888, of this tender to pay the notes.

66 Q. Have you, or did the bank keep any record of this letter, if so, state how it was done?

A. The bank had a letter press copy of the letter written to Mr. Cheney, which I now have before me. The letter press copy was made May 5, 1888. The letter was in my handwriting.

Complainant offers the letter in evidence, which is hereto attached and marked complainant's Exhibit "E."

40 Respondent Cheney objects as incompetent, irrelevant and immaterial, waiving the objection that Exhibit "E" is a copy of the letter press copy and saving all objections that might be made to the letter press copy.

67 Q. You can state, Mr. Holmes, whether or not there was any tender or offer of payment of the indebtedness of Mr. Wisherd to Mr. Cheney of any part thereof in the year 1890, and, if so, state what the transaction was?

Respondent Cheney objects as immaterial, incompetent and irrelevant and leading.

A. There was. On the 29, day of May, 1890, the cashier of the First National bank of Lincoln offered to pay the 14 notes given by Mr. Wisherd to Mr. Cheney, then in the possession of the Tecumseh National Bank. Made a tender of $17512. and demanded the notes.

68 Q. When did the Tecumseh National Bank get possession of those notes at that time?

A. May 17, 1890.

69 Q. You can state, Mr. Holmes, in whose handwriting tl is letter is?

A. The handwriting of P. D. Cheney the respondent.

70 Q. You can state, Mr. Holmes, whether the notes described in that letter describes the notes then in the hands of the Tecumseh, National Bank?

Objected to by respondent as immaterial, incompetent, irrelevant and leading.

A. Yes sir. The notes described in the letter are the notes that were left in the hands of the Tecumseh National Bank for collection.

71 Q. Where was that letter written?

A. It was written in the Tecumseh National Bank, on the 17th day of May, 1890.

41 Complainant offers the letter in evidence, a copy of which is hereto attached and marked complainant's Exhibit "F."

Respondent objects as incompetent, irrelevant, immaterial, no foundation laid for its introduction.

72 Q. Do you remember the cashier's name that came down from Lincoln and made this tender of the 29th of May, 1890 of $17512?

A. D. D. Muir was the cashier.

73 Q. What kind of funds did he have to pay the notes with at that time?

A. A greater portion of the funds was gold. I think there were some legal tender notes however.

74 Q. Did the bank accept that money for Mr. Cheney?

Objected to by respondent as leading, immaterial, irrelevant and incompetent.

A. It did not.

75 Q. You can state, Mr. Holmes, why the bank did not accept this money?

A. The amount was not sufficient to cover the principal and interest under our instruction from Mr. Cheney.

76 Q. When you speak of instruction, what do you refer to? The letter marked exhibit "F" or other instructions?

Objection by respondent Cheney as leading, incompetent, irrelevant and immaterial.

A. I refer to the instructions contained in the letter marked Exhibit "F." The bank had no other instructions from Mr. Cheney in this matter.

77 Q. You can state, Mr. Holmes, whether the bank gave Mr. Cheney notice of this tender of May 29, 1890. If so, state what notice was given?

A. Notice was given to Mr. Cheney by letter dated May 29, 1890, stating—

78 Q. Did the bank keep any record of that letter?

42 A. Yes, sir, I have a letter press copy of the letter, made in my handwriting, on the 29th day of May, 1890.

79 Q. Have you the letter press copy before you?

A. I have.

Complainant offers copy of the letter press copy in evidence, and the same is hereto attached and marked Complainant's Exhibit "G."

Respondent objects as immaterial, incompetent and irrelevant, waiving the objection that exhibit "G" is a copy of the letter press copy.

80 Q. Mr. Holmes, you can state if there was any notice left with the bank where this money could be had at any time, at that time?

Objected to by respondent as incompetent, immaterial and irrelevant.

A. I think not.

81 Q. Do you remember as to that?

A. I will not be positive. My recollection is, as I stated.

82 Q. Did you have any notice from any one representing Mr. Wisherd or Mr. Bilby or the bank, that is the First National Bank of Lincoln, that the money could be had there? Either at this time or at any other time during the tenders were made?

Objected to by respondent as immaterial, incompetent, irrelevant and leading.

A. I do not remember any communication in reference to this matter at that time. It is possible Mr. Muir may have

said to me "the money would be at the First National Bank of Lincoln."

83 Q. Did you receive any reply from Mr. Cheney of your letter to him of May 29, 1890.

A. I did.

84 Q. Have you that letter in your possession?

A. I have.

85 Q. Please hand the same to the notary for identification.

43 Complainant offers the letter in evidence as plaintiff's exhibit "H" and a copy of the same is hereto attached and marked plaintiff's exhibit "H."

86 Q. Mr. Holmes, you can state whether during the times between the 2nd day of May 1882, and the 17th day of May, 1890, any of these 14 notes described in complainant's exhibit "F" was in the possession of the bank of Russell & Holmes of Tecumseh or its successor, the The Tecumseh National Bank of Tecumseh, for collection or payment?

Objected to by respondent as incompetent, immaterial, irrelevant and leading.

A. I think none of the notes were in the possession of the bank of Russell & Holmes or the Tecumseh National Bank between the dates mentioned.

87 Q. Mr. Holmes, you can state whether there was any tender or offer of payment of the Wisherd indebtedness to Respondent Prentiss D. Cheney in the year 1891, if so state the time, the amount and the kind of funds and by whom made?

Objected to by respondent Cheney as leading, incompetent, immaterial and irrelevant.

A. Not to my knowledge. There was a tender made to the Tecumseh National Bank to me as president of that bank and as a member of the firm of Russell & Holmes on the 2nd day of May, 1891, by the cashier of the First National Bank of Lincoln. I cannot say whether it was Mr. Muir or Mr. Lippincott, assistant cashier. It was one or the other of $19512. in coin and legal tender notes to pay the indebtedness of Mr. Wisherd to respondent Cheney. Oscar Callihan was cashier at that time and the one who made the tender. I recall this after refreshing my memory by reference to the correspondence.

88 Q. Where were the Wisherd notes at that time?

A. I am not able to say whether the notes were in the bank at that time or not, I think they were not.

44 89 Q. Do [—] remember at that time whether you was told by the cashier of the First National Bank of Lincoln anything about this tender being kept good. If so, state it. At Lincoln?

Respondent Cheney objects as leading, immaterial, incompetent and irrelevant.

A. I do not remember.

90 Q. Did the Tecumseh National Bank or the firm of Russell & Holmes give Mr. Cheney any notice of this tender. If so, state when and what kind of notice.

Objected to by respondent as incompetent, immaterial and irrelevant.

A. On the 2nd day of May, 1891, as president of the Tecumseh National Bank I notified Mr. Cheney in writing of the tender. I mailed him a letter.

91 Q. Did you keep a record of the letter you sent him?

A. I did. I have the letter press copy of the letter made at the time.

92 Q. Please produce the letter press copy?

Complainant offers the letter press copy in evidence and a copy of the same is hereto attached, marked complainant's Exhibit "I."

Respondent objects as incompetent, immaterial and irrelevant.

93 Q. Do you remember to whom the deed was asked to be made to by the cashier?

Respondent Cheney objects as incompetent, irrelevant, immaterial and as leading.

A. I do not remember that any name was given me.

95 Q. Did you have any further correspondence with the respondent Cheney in relation to the matter?

A. I have no recollection of any.

Cross-Examination.

By C. E. Magoon:

96 Q. Where are these Wisherd notes now, Mr. Holmes?

A. I do not know.

45 97 Q. When did you last see them?

A. I saw them on the 5th day of May, 1891, am not certain that I have ever seen them since.

98 Q. When you received 14 of these notes from Mr. Cheney, how long did you retain them?

A. I think they remained in the bank until, 1891. Would not be positive.

99 Q. What did you then do with them?

A. I am not able to say whether those notes remained in the Tecumseh National Bank or were delivered to Mr. Cheney [im] May, 1891.

100 Q. Was it not a fact that the Tecumseh National Bank returned them to Mr. Cheney and that afterwards they were returned to the Tecumseh National Bank or to you or to some firm or corporation with which you were connected by some person other than Mr. Cheney?

A. I have an indistinct recollection that these notes were returned or given to Mr. Cheney at some time after May 17, 1890. Am not able to say definitely, however, whether they were returned to him or not.

101 Q. Were these notes not sent to you or to the bank or to the firm of Russell & Holmes by Mr. Wisherd or by a firm of attorneys for him after the time that you received them from Mr. Cheney?

A. I have been under the impression that those notes did come to Russell & Holmes or to the Tecumseh National Bank from some one other than Mr. Cheney, but I cannot say positively nor fix the time if any were.

102 Q. Who has possession of the correspondence of the Tecumseh National Bank for the year 1891, and the year 1890?

A. The officers of the Tecumseh National Bank.

103 Q. Who has possession of the correspondence of the old firm of Russell & Holmes?

A. Most of that is in the possession of the Tecumseh National Bank.

46 104 Q. Did not the firm of Russell & Holmes or the Tecumseh National bank receive these notes from the [towm] of Wisner, this State?

A. I think so.

105 Q. What was done with these notes?

[—] My recollection is that these notes were in the possession of the Tecumseh National Bank, when I severed my connection with that bank, in October, 1892.

106 Q. Can you produce the correspondence in which the notes were received?

A. I have no control over the correspondence now in possession of the Tecumseh National Bank.

107 Q. You have produced and used in your evidence herein the private letter books and the letters of correspondence of the Tecumseh National Bank have you not?

A. I have.

108 Q. Will you produce the letter above referred to?

A. I can go to the bank and make a search for it with the consent of the cashier.

109 Q. Will you make such search?

A. I will.

110 Q. If found will you allow the letter or a copy of it to be attached to your deposition as a part thereof?

A. I will.

111 Q. On whose behalf was the alleged tender of 1890, and 1891, made?

A. I do not think anything was said definitely as to who furnished the money at the time the tender was made. The inquiry was for the Wisherd notes and a tender to pay them.

112 Q. Was Wisherd present at any of these alleged tenders?

A. Yes. Wisherd was present at some of them. The earlier ones.

113 Q. How many?

A. I remember particularly that he was there once with Mr. Chapman and I remember that he was at the bank
47 in 1883, and 1884, in May, and I think in 1885. Can't say positively whether he was present or not. I think he was there in 1888. I am quite sure he was not there in 1889, nor at any time after that.

114 Q. Was anythng said regarding a person upon whose behalf the alleged tenders of 1889, 1890 and 1891, were made?

A. I have no recollection of anything being said in 1889, or 1890. I remember a conversation with Mr. Callihan, in May 1891, in which something was said about Mr. Bilby having furnished the money for that tender, or of being responsible to the bank for the amount.

115 Q. Was the tender of 1891, made on behalf of Bilby?

A. Nothing positively was said by Mr. Callihan about whom he made the tender for, but in our conversation something was said about Mr. Bilby having furnished the money or having agreed to furnish the money to the bank for that purpose.

116 Q. What was the condition attached to the alleged tender of May, 1891?

A. He demanded the notes and a deed to the land described in the contract.

117 Q. Have you found the letter for which you consented to make search relating to the receiving and transmission of the Wisherd notes by the bank in 1891?

A. I have.

118 Q. Will you produce it?

(Witness produces letter.)

119 Q. I hand you a paper marked respondent Cheney's exhibit "A," and ask you to state what it is?

A. It is a letter purporting to be from Allen, Robinson & Reed, lawyers at Madison, Nebr. and addressed to Russell & Holmes.

120 Q. Is it the letter in which was inclosed the Wisherd notes herein involved?

48 A. It is.

121 Q. How many notes were there in that letter?

A. 16.

122 Q. I notice an annotation in writing following the name of the person signing the letter, was that annotation on there at the time of its receipt?

A. It was not.

123 Q. By whom was that annotation made?

[—] By myself.

124 Q. Have you in your possession, I mean do you hold in your hands the notes referred to in the letter and which came inclosed therein?

A. I have.

125 Q. Have you the envelope in which this letter and the notes were inclosed?

A. I have.

126 Q. Will you allow copies of the same to be made a part of your deposition herein?

A. I will.

Respondent Cheney offers in evidence the letter, the 16 inclosures and the envelope and the annotation made on the letter by the witness, copies of which are hereto attached.

Complainant objects to the introduction of said letter as not proper cross-examination, incompetent, immaterial and irrelevant, also to the introduction of the notes and the envelope and the annotation on the letter on the same grounds, waiving the originals and not objecting to the copies on the [graounds] that they are not originals.

127 Q. Was Prentiss D. Cheney, the respondent herein, in the Tecumseh National Bank on the 5th day of May, 1891?

A. He was.

128 Q. What did he do there at that time?

49 A. He presented notes given by Wisherd to himself and demanded payment.

129 Q. Were the notes which he then presented and on which he demanded payment the same notes which you have presented here copies of which are attached to your deposition?

A. They were.

130 Q. How many notes did he then and there present?

A. 16, being the same notes, copies of which are attached hereto.

131 Q. When these alleged tenders were made, you may state whether or not after the tender the money was deposited in the bank for any purpose whatever, or was it taken away by the parties who made the alleged tender?

A. The tender was never left for any length of time. In one or two instances the amount remained for a day or two.

132 Q. Did any of it ever remain for more than 24 hours?

A. Yes, sir, in one case, when it remained over Sunday. I don't think any of it remained over 48 hours.

133 Q. Was it not a fact, Mr. Holmes, that the money was taken out of town as soon as the parties who brought it could get out on the next train?

A. Yes, that was the case as a rule.

134 Q. Where the money remained for 48 hours, was for such cases, as where Sunday intervened and no trains were running. Was that not a fact?

A. Yes, that is a fact, except in the last case perhaps.

135 Q. How would this money be deposited in the bank? Would it be left there for [save] keeping only or would it be deposited there to the credit of some person?

A. Left there for safe keeping.

136 Q. It would be left there at the bank because the person who brought it there disliked to take it to the hotel or keep it on his person, for the time he was obliged to be in the city?

A. Yes, sir.

137 Q. Referring to the alleged tender of May 1891. How long did that money remain in the bank, or was it ever in the bank except in the custody of another person?

A. I think Mr. Callihan stayed over one day. He was visiting and attending to some other matters. The money was kept in the bank safe, separate from the bank funds.

138 Q. Was it kept in the original packages in which Mr. Callihan brought it to the bank?

A. He shipped 9 or 10 thousand dollars in gold by express and that was left in the sack that it came in. The other money was placed in the safe with the bank money, all of it in fact.

139 Q. Did he get any of this money from your bank?

A. Yes.

140 Q. How much of it?

A. I am not able to say.

141 Q. About how much?

A. I can't say. I think perhaps—I think he brought 10 or 12 thousand dollars by express and got the balance from us.

142 Q. Was any of the money for the other tenders secured from your bank in a similar way?

A. Yes, sir.

143 Q. In how many instances?

A. Along at first they shipped all the money down. When Chapman made the tender, he brought all of the money. At the time Callihan made the tender in 1887, we furnished him the money, all of it.

144 Q. From that on, how was it?

A. We would furnish a portion of it to save express charges for the bank up there.

145 Q. Did not your bank frequently secure currency from the First National Bank of Lincoln, Nebraska?

51 A. Yes, sir. We shipped currency both ways from them and to them.

146 Q. Is it not a fact that when some of these tenders were made, the money instead of being taken away, was turned over to your bank and charged to your account with the First National Bank of Lincoln?

A. In some cases that was done. A portion was left if we needed currency or could use it.

147 Q. If you needed it or could use it the currency was turned over to you for the use and benefit of your bank?

A. Yes, sir.

148 Q. In how many instances was this done?

A. I should think only 2 or 3 times or 3 or 4 times. Usually the currency was returned to Lincoln.

149 Q. The officers of the First National Bank of Lincoln would usually return to Lincoln the same day that they came down here to Tecumseh, would they not?

A. Yes, if the trains allowed them to.

Respondent rests.

Re-Direct Examination.

150 Q. Trains in those days all met here in the middle of the day, did they not?

A. You are getting into something—sometimes they did and some times they didn't.

151 Q. Mr. Cheney, the day that he came here and said he wanted those notes paid in May 1891, what, if anything, did he say, about going to Lincoln to get the money?

[—] I told him what had taken place a few days before in relation to the tender made by the cashier of the First National Bank of Lincoln, and that the money had been returned there. I think he said he would probably go to Lincoln and see the officers of the bank.

152 Q. Did you say that he brought the notes to the bank that day and demanded payment?

52 A. I did not say he brought the notes with him but think he did. I know he had them in his possession when he demanded payment.

153 Q. Did he state to you how much money he wanted for the notes?

A. I think not. I told him the tender had been withdrawn.

154 Q. In what way did you tell him the tender had been withdrawn?

A. That it had been returned to the First National Bank of Lincoln.

155 Q. At the time that you received these notes from the firm of attorneys at Madison, in 1891, did you have a further correspondence with them, or did you have any correspondence with them?

A. I do not remember whether I wrote them or not. I receipted for the registered letter, I think that was all.

156 Q. Did you give Mr. Cheney any notice that you had the notes?

A. I do not remember now. I find no copy in the letter book and I don't remember.

157 Q. Do you know anything about an order he gave to the Tecumseh National Bank for the notes at a later date than this?

A. No, sir.

158 Q. Have you heard the cashier of the bank speak of it?

(Question withdrawn.)

159 Q. This furnishing of a portion of the tender that you have spoken of was a matter of convenience between you and the First National Bank of Lincoln, was it or was it not?

Respondent objects as leading.

A. As a matter of convenience and courtesy between our bank and the First National Bank of Lincoln.

CHARLES A. HOLMES.

Witness excused.

Subscribed in my presence and sworn to before me this 27th day of November, 1894.

[Seal] CORYDON ROOD,
Notary Public.

Com. expires July 18, 1895.

53 COMPLAINANT'S EXHIBIT "A."

Atchison, Kansas, May 30, 1884.

Messrs. Russell & Holmes.

Gents: Yours of 28th recd. saying that you have no word from J. A. Wisherd.

There was due from him the first part of this month some $2800 on a land contract payable at your office.

If you do hear from him and he offers to pay, I authorize and request you to say to him for me that I will not take the money. That his contract was terminated by his failure to pay or to offer payment when due and I do not and shall not recognize the contract as binding me to convey the land. I do not know his address or I would write to him.

The payment of the money would have been a great convenience and accommodation and benefit to me during the financial panic. I propose to know from the highest law authority whether I am entitled to the benefits of the contract or not.

Yours truly,

P. D. CHENEY.

COMPLAINANT'S EXHIBIT "B."

Tecumseh, Nebr. May 18, 1885.

P. D. Cheney, Esq.
Jerseyville.

Dear Sir: J. A. Wisherd called at our bank to-day and demanded his notes which are now due and offered to pay the amount now due—made a tender of $5785.00 for the purpose. As the notes are not in our possession he has withdrawn the money and desires us to say to you that he will deposit the amount stated, in First National Bank of Lincoln, Nebr, with instructions to pay same to you or your attorneys on demand and that he will pay the balance due you under the contract at any time that you will give him 30 days notice.

54 Yours truly,

RUSSELL & HOLMES.

COMPLAINANT'S EXHIBIT "C."

Tecumseh, Nebr. May 5, 1886.

P. D. Cheney, Esq.
Jerseyville, Ills.

Dear Sir: J. A. Wisherd has made tender to us of Eight thousand Three hundred and Fifty-one ($8351) dollars in gold coin in payment of his notes given to you and interest thereon —being payable at this bank.

Yours truly,

RUSSELL & HOLMES.

COMPLAINANT'S EXHIBIT "D."

Tecumseh, Nebr. May 8, 1889.

P. D. Cheney, Esq.
Jerseyville.

Dear Sir: On the 4th inst. Mr. P. S. Chapman for John A. Wisherd made a tender to us of $2226.36 in legal tender notes and coin to pay the notes given by John A. Wisherd to you, due May 2-5, 1889. He handed us what purported to be a contract between you and Wisherd dated May 2, 1881, and demanded the notes named therein due May 2/89, so that he might pay them. On the 6 inst. he again made the tender of $2226.36 offered to pay the notes, &c. as he had done the evening of May 4th. All of which we submit for your information.

Yours truly,

RUSSELL & HOLMES.

COMPLAINANT'S EXHIBIT "E."

Tecumseh, Nebr. May 5, 1888.

P. D. Cheney, Esq.
Jerseyville, Ills.

55 Dear Sir: A tender of $2339.56 in gold and silver coin has been made to-day by one P. S. Chapman to pay the notes given by J. A. Wisherd to you, due May 2-5, 1888.

The party asked for the notes and offered to pay them with the money as above stated. Of course we had to say that the notes were not in our possession.

Yours truly,

RUSSELL & HOLMES.

COMPLAINANT'S EXHIBIT "F."

No. 4276.

Tecumseh National Bank.

Successor to Bank of Russell & Holmes.

Tecumseh, Nebr. May 17, 1890.

C. A. Holmes, Esq.
Prest. Tecumseh, Nebr.

Dear Sir:

Herewith I hand you for collection and my Cr. 14 past due notes of J. A. Wisherd, all dated May 2/81, viz:

No. 3488	due	May	2/90.....	$1886.73
3489	"	"	2/89.....	1886.73
3490	"	"	2/88.....	1886.73
3491	"	"	2/87.....	1886.73

	3492	"	" 2/86.....	1886.73
	3493	"	" 2/85.....	1886.73
	3494	"	" 2/84.....	1886.73
	3496	"	" 2/90.....	226.43
	3497	"	" 2/89.....	339.63
	3498	"	" 2/88.....	452.83
	3499	"	" 2/87.....	566.03
	3500	"	" 2/86.....	679.23
56	3501	due	May 2/85.....	792.43
	3502	"	" 2/84.....	905.63

all drawing ten per cent. interest after due.

If Mr. Wisherd will pay same, you will please receive payment therefor for me.

Mr. Wisherd to pay the full amount of principal and ten per cent. interest on each of the 14 notes according to their terms.

You will not receive any part payment on the notes or on any of them. I require full payment of all the notes.

Yours truly,

P. D. CHENEY,
of Jerseyville, Ill.

COMPLAINANT'S EXHIBIT "G."

No. 4276.

Tecumseh National Bank,

Successor to Bank of Russell & Holmes,

Tecumseh, Nebr. May 29, 1890.

P. D. Cheney, Esq.
Jerseyville, Ill.

Dear Sir: At 4 o'clock this afternoon the cashier of the First National Bank of Lincoln, Nebr. called at this bank and offered to pay the 14 notes of J. A. Wisherd which you left here for collection May 17, 1890; that is he made a tender of $17,512.00 and demanded the notes, claiming that was the amount Mr. Wisherd instructed him to tender and to pay the same upon surrender of the notes. As the amount was not sufficient to cover the interest and principal we declined to surrender the notes or accept the money in payment of them and hold the notes subject to your further instructions.

Yours truly,

C. A. HOLMES, Pt.

57 COMPLAINANT'S EXHIBIT "H."

Jerseyville, Illinois, June 2nd, 1890.

C. A. Holmes, Esq.

Dear Sir: Yours of May 29/90 recd. saying that cashier of 1st Nat'l Bank Lincoln had made a tender of $17,512. for the

14 notes of J. A. Wisherd. Did he show you or state to you any figures & dates by which he arrived at the sum of $17512.? I would like to know why that sum is the amount due me. Will you kindly give me such information as you may have on that point.

Yours truly,

P. D. CHENEY.

Is the $17512. now in your hands?

COMPLAINANT'S EXHIBIT "I."

Tecumseh, Nebr. May 2, 1891.

P. D. Cheney, Esq.
Jerseyville, Ill.

Dear Sir: The cashier of the First Nat'l Bank of Lincoln, Neb. has this day made a tender of (19,512.00) Nineteen thousand Five hundred and Twelve dollars for J. A. Wisherd to pay certain notes described in a contract dated May 2nd, 1881, between you and said Wisherd; demanded the notes and a deed to the land described in the contract.

The tender and demand was made to me as one of the firm of Russell & Holmes and also as an officer of this bank.

Yours truly,

C. A. HOLMES, Pt.

58 RESPONDENT'S EXHIBIT "A."

Madison, Nebraska, May 13, 189--.

Russell & Holmes,

Gentlemen: We enclose you for the use and benefit of P. D. Cheney 16 notes made to him by John A. Wisherd which was by mistake taken by Mr. Wisherd's father from the express office at Clarkson, in this State, yesterday. Mr. Cheney has been fully informed of their return to your office where they appear to be payable. Please acknowledge their receipt and oblige,

Truly,

ALLEN, ROBINSON & REED.

May 19, 1891.

These notes are sent to us without any authority or request upon our part. We simply hold them for the owner whoever he may be.

RUSSELL & HOLMES.

Copy of Envelope.

Return in five days to
Allen, Robinson & Reed
Attorneys,
Stuart's Bank Building,
Madison, Nebr.

Post office stamp.
Madison,
May
14,
1891.
Nebr.

16 notes given by J. A. Wisherd to P. D. Cheney.

REGISTERED.

Mess. Russell & Holmes,
Tecumseh,
Johnson County,
Nebraska.

59 RESPONDENTS' EXHIBIT "A."

$1886.73 Tecumseh, Nebraska, May 2nd, 1881.

Principal Note.

Three years after date for value received, I promise to pay to the order of P. D. Cheney, Eighteen hundred and Eighty-six & 73/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Third year.

Tecumseh National Bank.
No. 31628.
Tecumseh, Nebr.

Indorsed on the back as follows: 3494. No. 2751. Without recourse on me in any event. P. D. Cheney.

$1886.73 Tecumseh, Nebraska, May 2nd, 1881.

Principal Note.

Four years after date, for value received, I promise to pay to the order of P. D. Cheney, Eighteen hundred & Eighty-six & 73/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Fourth year.

Tecumseh National Bank,
No. 31629,
Tecumseh, Nebr.

Indorsed on the back as follows: 3493. Without recourse on me in any event. P. D. Cheney.

Fifth year. Principal Note.

$1886.73. Tecumseh, Nebraska, May 2nd, 1881.

Five years after date for value received, I promise to pay to the order of P. D. Cheney, Eighteen hundred & Eighty-six & 73/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Tecumseh National Bank
No. 31630.
Tecumseh, Nebr.

Indorsed on the back as follows: 34-92. Without recourse on me in any event. P. D. Cheney.

Sixth year. Principal Note.

60 $1886.73 Tecumseh, Nebraska, May 2nd, 1881.

Six years after date, for value received, I promise to pay to the order of P. D. Cheney, Eighteen hundred & Eighty-six & 73/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

No. 31631.

Indorsed on the back as follows: 3491. Without recourse on me in any event. P. D. Cheney.

Seventh year. Principal Note.

1886.73. Tecumseh, Nebraska, May 2nd, 1881.

Seven years after date, for value received, I promise to pay to the order of P. D. Cheney, Eighteen hundred & Eighty-six & 73/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Indorsed on the back as follows: 3490. Without recourse on me in any event. P. D. Cheney.

Eighth year. Principal Note.

1886.73 Tecumseh, Nebraska, May 2nd, 1881.

Eight years after date, for value received, I promise to pay to the order of P. D. Cheney, Eighteen hundred & Eighty-six 73/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Indorsed on the back as follows: 3489. Without recourse on me in any event. P. D. Cheney.

Ninth year. Principal Note.

61 $1886.73. Tecumseh, Nebraska, May 2nd, 1881.

Nine years after date, for value received, I promise to pay to the order of P. D. Cheney, Eighteen hundred & Eighty-six & 73/100 dollars, payable at the office of Russell & Holmes, without interest before due with ten per cent per annum after maturity.

J. A. WISHERD.

Indorsed on the back as follows: 3488. Without recourse on me in any event. P. D. Cheney.

Tenth year. Principal Note.

$1886.73. Tecumseh, Nebraska, May 2nd, 1881.

Ten years after date, for value received, I promise to pay to the order of P. D. Cheney, Eighteen hundred & Eighty-six & 73/100 dollars, payable at the office of Russell & Holmes, without interest before due with ten per cent per annum after maturity.

J. A. WISHERD.

Indorsed on the back as follows: 3487. Without recourse on me in any event. P. D. Cheney.

Tenth year's Interest Note.

$113.23/100 Tecumseh, Nebraska, May 2nd, 1881.

Ten years after date, for value received, I promise to pay to the order of P. D. Cheney, One hundred & Thirteen & 23/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Indorsed on the back as follows: 3495. John A. Wisherd. May 2/91. $113.23. Without recourse on me in any event. P. D. Cheney.

Ninth year's Interest Note.

62 $226.43 Tecumseh, Nebraska, May 2nd, 1881.

Nine years after date, for value received, I promise to pay to the order of P. D. Cheney, Two hundred & Twenty-six & 43/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Indorsed on the back as follows: 3496. Without recourse on me in any event. P. D. Cheney.

Eighth year's Interest Note.

$339.63 Tecumseh, Nebraska, May 2nd, 1881.

Eight years after date, for value received, I promise to pay to the order of P. D. Cheney, Three hundred & Thirty-nine & 63/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Indorsed on the back as follows: 3497. Without recourse on me in any event. P. D. Cheney.

Seventh year's Interest Note.

$452.83/100 Tecumseh, Nebraska, May 2nd, 1881.

Seven years after date, for value received, I promise to pay to the order of P. D. Cheney, Four hundred & Fifty-two & 83/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Indorsed on the back as follows: 3498. Without recourse on me in any event. P. D. Cheney.

Sixth year's Interest Note.

63 $566.03 Tecumseh, Nebraska, May 2nd, 1881.

Six years after date, for value received, I promise to pay to the order of P. D. Cheney, Five hundred & Sixty-six & 03/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Indorsed on the back as follows: 3499. Without recourse on me in any event. P. D. Cheney.

Fifth year's Interest Note.

$679.23/100 Tecumseh, Nebraska, May 2nd, 1881.

Five years after date, for value received, I promise to pay to the order of P. D. Cheney, Six hundred & Seventy-nine & 23/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Indorsed on the back as follows: 3500. John A. Wisherd. Without recourse on me in any event. P. D. Cheney.

Fourth year's Interest Note.

$792.43/100 Tecumseh, Nebraska, May 2nd, 1881.

Four years after date, for value received, I promise to pay to the order of P. D. Cheney, Seven hundred & Ninety-two & 43/100 dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHER.

Indorsed on the back as follows: 3401. Without recourse on me in any event. P. D. Cheney.

64 $905.63/100 Tecumseh, Nebraska, May 2nd, 1881.

Three years after date, for value received, I promise to pay to the order of P. D. Cheney, Nine hundred & Five & 63/100 dollars, payable at the order of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

Indorsed on the back as follows: 3502. Without recourse on me in any event. P. D. Cheney.

I, Corydon Rood, notary public in and for Johnson County, Nebraska, do hereby certify that Charles A. Holmes was by me first duly sworn to testify the truth, the whole truth and nothing but the truth and that the deposition by him subscribed, as above set forth, was reduced to writing by A. M. True, who is not interested in the suit, under my direction, in my presence and in the presence of the witness and was subscribed by the said witness in my presence and was taken at the time and place in the annexed notice specified; that I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit; and that said depositions were commenced at the time in said notice specified.

In witness whereof I have hereunto set my hand and official seal, this 27th day of November, 1894.

(Seal.) CORYDON ROOD,
Notary Public.

Com. expires July 18, 1895.

Notary's Fees,	18.00
C. A. Holmes,	
Witness fees	2.00
	$20.00

The above fees paid by Complainant's attorney, Nov. 27, 1894.

CORYDON ROOD, Notary Public.

Upon the back of said Depositions appear indorsements in the words and figures following, to-wit: No. 270 P. Rec'd. & filed Nov. 30, 1894, & opened by order of Court Jan'y 26, 1895. Elmer D. Frank, Clerk.

65 Thereupon afterwards, to-wit: on the 7th day of January, 1895, Depositions on behalf of the Complainant were filed in said case, which said Depositions are in the words and figures, following, to-wit:

In the Circuit Court of the United States, Judicial District of Nebraska.

The State of Nebraska,
County—ss.

NOTICE TO TAKE DEPOSITIONS.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney and Susan B. Alden, Executrix, Respondents.

The above named respondents will take notice, that on Monday the tenth day of December, 1894, the said complainant will take the depositions of R. D. Miller; P. S. Chapman; C. S. Lippincott; J. D. McFarland and Oscar Callihan, sundry witnesses, to be used as evidence on the trial of the above entitled cause, at the office of J. D. McFarland, in the city of Lincoln and State of Nebraska, between the hours of nine A. M. and six P. M. of said day, and the taking of said depositions will be adjourned from day to day, between the same hours, until they are completed.

LAKE, HAMILTON & MAXWELL and R. W. SABIN,
Solicitors for Complainant.

Received copy of the above notice this 6th day of December, A. D. 1894.

A. HAZLETT,
Solicitor for Susan B. Alden, Executrix, Respondent.

66 In the Circuit Court of the United States, Judicial District of Nebraska.

The State of Nebraska,
Gage County—ss.

NOTICE TO TAKE DEPOSITIONS.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, et al, Respondents.

The above named respondents will take notice, that on Monday the tenth day of December, 1894, the said complainant will

take the depositions of R. D. Miller, P. S. Chapman, C. S. Lippincott, J. D. McFarland, Oscar Callihan, Benkleman, Nebr. D. D. Muir, Denver, People's National Bank, sundry witnesses, to be used as evidence on the trial of the above entitled cause, at the office of J. D. McFarland in the city of Lincoln, County of Lancaster, and State of Nebraska, between the hours of nine (9) A. M. and six (6) P. M. of said day, and the taking of said depositions will be adjourned from day to day, between the same hours, until they are completed.

LAKE, HAMILTON & MAXWELL & R. W. SABIN,
Solicitors for Complainant.

Received copy of the above notice this 7th day of December, A. D. 1894.

CHAS. E. MAGOON,
Solicitor for Respondent, Prentiss D. Cheney.

A. HAZLETT, per
Solicitor for Respondent Susan B. Alden.

67 In the Circuit Court of the United States, District of Nebraska.

The State of Nebraska,
Lancaster County—ss.

DEPOSITIONS.

John S. Bilby, Complainant,
vs.
Prentiss B. Cheney and Susan B. Alden, Executrix, Respondents.

Depositions of sundry witnesses taken before me, a notary public duly commissioned and qualified for and residing in the County of Lancaster and State of Nebraska, on the tenth day of December in the year, 1894, between the hours of nine, A. M. and six, P. M. at the office of J. D. McFarland, in the city of Lincoln, in said County, pursuant to the annexed notice, to be read in evidence on behalf of the complainant in an action pending in the Circuit Court of the United States for the District of Nebraska, in which John S. Bilby is complainant and Prentiss D. Cheney and Susan B. Allen, Executrix, are respondents.

Charles S. Lippincott of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposes and says, as follows, viz:

For complainant R. W. Sabin.

Appearances:

For respondent Cheney, C. E. Magoon.

By Mr. Sabin.

Q. State your name, age, place of residence and occupation?

A. Charles S. Lippincott, 36, assistant cashier of the First National Bank, Lincoln, Nebraska.

Q. How long have you been connected with the First National Bank of Lincoln?

[—] Since '81.

Q. What has been your position in the bank since '84?

68 I think I was general book-keeper in '84, and since that time—I don't remember what date it was that I first began to act as second assistant cashier under Mr. Muir.

Q. During the month of May, 1884, were you in the bank?

Yes, sir.

Q. Were you here in the month of May, 1885, in the First National Bank?

Yes, sir.

Q. You may state what you know of a tender being made by this bank, the First National Bank, for John A. Wisherd to Prentiss D. Cheney, at the Bank of Tecumseh, in the spring of 1885, in the month of May?

A. I would say I know nothing personally, further than the memoranda and letters that we find among the other papers in the bank.

Q. Just identify the one that has reference to that transaction?

I find here a tag marked $5785.00.

[—] I will ask you if that tag is a part of the records of your bank?

Yes, sir.

Q. You may state in whose handwriting it is?

Part of it is in John R. Clark's and part of it in S. B. Platt's.

Q. You may state where they are?

They are both dead.

Q. How long have they been dead?

Mr. Clark died in 1890—August, 1890, and Mr. Platt some years ago. I don't know how long since.

Q. What relationship did Mr. Clark bear to the bank at that time?

He was cashier.

Q. And what relation did Mr. Platt bear to it?

Employee simply, no specific title.

Q. He was working in the bank?

He was working in the bank, yes sir, and I think at that time he was in charge of the discounts. That is, he might have acted as discount clerk.

69 Q. Which part of this tag is in Mr. Clark's handwriting?

The writing on the face of the tag.

Q. And that on the back—

Is Mr. Platt's.

Q. Do you know whether these records were made on or about the time they bear date?

I don't know, I presume they were.

Q. How long have they been in the bank here, to your knowledge?

Ever since they were made. Ever since 1885.

Q. Will you permit the notary to take a copy of this tag and attach it to your deposition?

Yes, sir.

Complainant offers in evidence the face and back of the tag in question, copies of which are hereto attached, marked respectively exhibits A and exhibit B, and made a part of this deposition.

Respondent Cheney objects to the introduction of these exhibits as incompetent, irrelevant and immaterial.

Q. Now you may state Mr. Lippincott, whether there is anything attached to this tag?

Yes, sir, we have here several letters.

Q. What do you find in connection with the tender of 1885?

I find this draft for $5800.00.

Mr. Magoon: Just state a draft attached. You need not state the contents of any paper.

Q. I will ask you how these papers were kept by the bank?

In one of our special boxes.

Q. With what other papers?

This has been kept in what we knew as our collateral box.

Q. I have reference to the papers in connection with what matter?

That paper had been kept with other papers and letters relating to this Wisherd matter.

70 Q. Cheney, Wisherd and who else?

Well, there is Cheney and Wisherd and a party by the name of Alden, I guess as far as I know. All we know is Wisherd and Cheney. That is all the record we have here.

Q. Will you consent to allow the notary to take a copy of this draft, and to produce the original at the hearing if called upon?

Yes, sir.

Complainant offers in evidence the draft referred to [be] witness, and a copy of the same is hereto attached, marked exhibit C, and made a part of this deposition.

Respondent Cheney objects to the offer of this exhibit in evidence as incompetent, irrelevant and immaterial.

Q. You may state now, Mr. Lippincott, what you know about that amount of money being held here as a tender for Mr. Cheney. This $5785.00?

Why, $5785.00 appears on our teller's cash record. On the 11th day of May, 1885, there was $5755.00.

Q. That is the 11th?

Yes, sir.

Q. 1885?

Yes, sir.

Q. Now, you may state whether that amount was increased at any time?

On the 17th day of May, 1885, it was increased to $5785.00.

Q. You may state, Mr. Lippincott, how long that was carried in that way?

A. It was so carried until the 4th day of May, 1886.

Q. You may state what was done then?

At that time there was another entry of twenty-five hundred—

Q. You need not tell that.

I can't tell just what was done without that.

Q. State what was done with that amount, whether it was increased or diminished?

Increased.

71 Q. How much increase?

$2566.00.

Q. At what time?

The 4th day of May, 1886.

Q. How was that amount carried?

It was carried in the cash.

Q. Carried as a cash item?

Carried as a cash item, yes, sir.

Q. What record have you, if any, of the tender in 1886, in May?

The only record we have of the 1886 tender is on the back of that tag marked exhibit B.

Q. This is '85, isn't it?

Yes, sir, and '86 also.

Q. How was this cash item carried from 1886?

From May 4th, 1886, to December 22, 1886, it was carried as $8351.00 cash.

Q. How was it carried then?

From December 22, 1886, until January 30th, 1887, it was carried as $5785.00.

Q. You may state whether or not you have any bills receivable that Mr. Wisherd gave in the year 1885, also in the year 1886?

Yes, sir, (Producing same).

Q. You may state whether or not this note of the complainant's (exhibit D), was a part of the bills receivable at the bank at any time?

Yes, sir.

Q. You may state, if you know, what this was given for?

$5785.00. It was given for the purpose of obtaining money to make the tender at Tecumseh.

Q. You may state whether the stamp there shows the date on which the note was paid?

Yes, sir.

72 Q. You may state how much interest was paid on that note at the time it was paid?

$543.00.

Q. That is the amount that is indorsed on the back of the note, is it not?

A. Part of the amount.

Complainant offers in evidence the paper identified by the [wirness] and a copy of the same is hereto attached, marked exhibit D, and made a part of this deposition.

Respondent Cheney objects to the introduction of this exhibit D, as incompetent, irrelevant and immaterial.

Q. Mr. Lippincott, you may state whether this note (complainant's exhibit E) was a record of your bank?

Yes, sir.

Q. You may state for what reason that note was given to your bank? For what purpose?

A. For money to make a tender to P. D. Cheney.

Q. At what point, if you know?

Tecumseh.

Q. You may state if that note was paid?

It is marked paid April 27, 1887.

Q. Was it paid at that time?

Yes, sir.

Q. What is the date?

April 27, 1887.

Q. You may state, if you know, what amount of interest was paid on that note?

$128.00.

Complainant offers in evidence the note just described by the witness, and a copy of the same is hereto attached, marked exhibit E, and made a part of this deposition.

73 Respondent Cheney objects to the introduction of this exhibit as incompetent, irrelevant and immaterial.

Q. Mr. Lippincott, do you know anything about the attorney of Mr. Cheney coming to the bank and asking for this $5785.00 at one time?

No, sir.

Q. Mr. Whedon. Sometime in the spring of 1886 or the winter of 1886?

No, sir, I don't know anything about it.

Q. Mr. Lippincott, you may state whether this paper (complainant's exhibit F), is a part of the records of the First National Bank Lincoln, held in this particular matter?

Yes, sir.

Q. Do you know whose handwriting it is?

John A. Wisherd's.

Complainant offers in evidence the paper identified by the witness, and a copy of the same is hereto attached, marked exhibit F, and made a part of this deposition.

Respondent Cheney objects to the introduction of this exhibit as incompetent, irrelevant and immaterial.

Q. You may state whether this letter (complainant's exhibit G) is a part of the correspondence of your bank?

Yes, sir.

Q. Do you know how that was received here?

No, sir.

Q. I will ask you if this stamp on it indicates how it was received?

That would indicate that it came in the regular course of mail.

Q. What time?

May 7th, 1887.

Complainant offers in evidence the paper identified by the witness and a copy of the same is hereto attached, marked exhibit G, and made a part of this deposition.

74 Respondent Cheney objects to the introduction of the exhibit as incompetent, irrelevant and immaterial, and as not binding upon the respondent.

Q. What other records have you of the 1887 tender?

A letter from Oscar Callihan.

Q. In whose behalf was he acting at that time?

In making the tender for Mr. Wisherd.

Q. Have you any other records of the 1887 tender and any arrangements that were made at that time towards securing the bank for making this tender or these tenders?

(Witness produces paper and hands same to attorney.)

Q. You may state, Mr. Lippincott, whether this paper marked by the notary exhibit H, is a part of the records of your bank?

Yes, sir.

Q. Do you know in whose handwriting that is?

John R. Clark's.

Q. And who signed it?

John A. Wisherd and John R. Clark.

Complainant offers in evidence the paper produced at this time by the witness, and a copy of the same is hereto attached, marked exhibit H, and made a part of this deposition.

Respondent Cheney objects to the introduction of this exhibit as incompetent, irrelevant and immaterial.

Q. What other security, if any, do you know of the bank taking at that time, in the year 1887, to secure the bank in making these tenders and keeping the same good?

A land contract.

Q. This paper marked by the notary exhibit I, an assignment of contract. To what was that attached?

To a land contract between P. D. Cheney of Jerseyville, Jersey County, Ill., and John A. Wisherd.

75 Complainant offers in evidence the paper shown to the witness, and a copy of the same is hereto attached, marked exhibit I, and made a part of this deposition.

Respondent Cheney objects to the introduction of exhibit I, and the contract attached thereto, as incompetent, irrelevant and immaterial.

In order to save the expense of copying the contract, it is admitted that the contract referred to in exhibit I, is the original contract between Prentiss D. Cheney of Jerseyville, Illinois and John A. Wisherd, executed on the 2nd day of May, 1881, for the conveyance of the land involved in this transaction, and the contract in controversy, respondent reserving such objection as could be made to the copy or the original if attached hereto.

Q. You may state whether the bank, after the arrangements that were made in 1887—whether you know about the tenders being kept from that time on.

Yes, sir, they were, each year.

Q. You may state whether the bank was in a condition and ready to pay the money upon the presentation of the notes represented in this contract, in accordance with the instructions of Mr. Wisherd in complainant's exhibit F?

A. Up to what time do you refer?

Q. You have stated already, I believe, that they had been ready up to this time to pay the money?

Yes, that is right.

Q. You may state whether the bank was ready from 1885, the time when these arrangements were made, until January 21, 1887?

Yes, sir.

Q. And I will ask you whether it was ready and in a condition to pay the notes from January 21, 1887, in accordance with the instructions of Mr. Wisherd on that date, from that time on until the end of the period?

76 A. Yes, sir.

Q. You may state whether this paper (complainant's exhibit J.) is a part of the records of your bank?

Yes, sir.

Q. You may state when that was received, and how it was received?

As far as I know, the usual course of mail, on the 7th day of May 1888.

Complainant offers in evidence the paper about which witness has just testified, and a copy of the same is hereto attached and marked exhibit J. and made a part of this deposition.

Respondent Cheney objects to the introduction of this exhibit as incompetent, irrelevant and immaterial.

Mr. Lippincott: I desire to make an explanation or an additional statement regarding one of my answers there. As I understand it the bank was ready to pay this money up to January 30th—or January 29th, 1887, the 30th being Sunday, at any time the demand was made upon it for the money. That is the way I wanted to put that answer. It was ready at the dates on which the tender was made each year, to pay the money.

Q. You may state, Mr. Lippincott, if you know, whom the arrangements were made with?

The arrangements were, I think, altogether confined to Mr. Clark and Mr. Wisherd. I don't think any one but Mr. Clark acted for the bank as long as he lived, up to August, 1890.

Q. He was at that time president, or cashier?

After the first of June, 1889, he was the president of the bank.

Q. And prior to that time—

He was cashier prior to that time.

Q. What position did Mr. Muir occupy in the bank during this period, if you know?

Assistant cashier up to the first of June, 1889.

77 Q. From what time?
Well, all during this period.
Q. Up to 1889?
I think up to June 1st, 1889. Following that he was cashier.
Q. To what period?
As long as he was with the bank. I don't remember the time he resigned.
Q. Where is Mr. Muir now—D. D. Muir?
He is vice-president of the People's National Bank of Denver.
Q. And resides in Denver?
Yes, sir.
Q. This memorandum, complainant's exhibit H, together with the complainant's exhibit I, were attached to the land contract?
Yes, sir.
Q. You do not know what the bank would have done between these periods?
No, sir.
Q. You realy did not actively participate in the matter?
No, sir.
Q. What you did know was what you observed of what the others did and by the records of the bank that are left?
Yes, sir.

Cross Examination.

By Mr. Magoon.

Q. Mr. Lippincott, did you ever make any [—] the [the] alleged tenders yourself, individually and personally?
No, sir.
Q. Whatever knowledge you possess relative to the alleged tenders, is derived from what has been told you by others or from written letters and memoranda, which you find among the papers of the bank; is not that a fact?
78 Well, yes, on the whole. I know there were tenders made.
Q. How do you know there were tenders made? Were you ever present when they were made, or alleged to have been made?
No, sir.
Q. Then all you would know as to what took place regarding the alleged tender, was what the person, who made the tender, or is alleged to have made the tender, reported?
That is true. I know the persons had been sent to Tecumseh with money to make the tender. That is as far as I know.
Q. But as to what they did with the money after they reached the place to which you say they were sent with the

money, you cannot testify except from hearsay?

That is all.

Q. Regarding the amount of $5755.00 which you say was placed in your bank on May 11, 1885. How was this money placed in the First National Bank of Lincoln?

It was secured by Mr. Wisherd's note. In other words, it was set a part for Mr. Wisherd's note. In other words, it for that amount.

Q. Mr. Wisherd came in to the bank and gave the bank his note for that amount, which amount was placed to his credit in the bank, was it?

No, it was put in a sack and carried in the bank's money.

Q. What do you mean by saying it was carried as the bank's money?

Well, I wouldn't say carried as the bank's money; this $5755.00 was counted in with the money belonging to the bank, as part of the funds of the bank in making up the cash.

Q. Now it was subsequently, on May 17, 1885, increased to $5785.00, was it not?

Yes, sir.

Q. What was the reason of that increase?

I do not know.

Q. Now was the $5785.00 carried along the same as the $5755.00 was carried?

79 Yes, sir.

Q. It continued to be carried then, in the same manner as you have testified to regarding the first item, for awhile?

Carried in the cash of the bank and counted in with the cash of the bank.

Q. On the 4th day of May, 1886, this amount of money was increased by the sum of $2566.00, was it not?

Yes, sir.

Q. In what way did that increase, to-wit: the sum of $2566.00, come into the bank?

By giving of a note by John A. Wisherd to the bank.

Q. For that amount?

For that amount.

Q. What was then done with sum which this item then aggregated?

It was still carried in the sum of $8351.00, the total of these two.

Q. And how carried?

As it had been carried along in the bank's money.

Q. And you say it was carried up to what time in that way?

To December 22, 1886.

Q. Did a change then take place either in the amount or in the method of carrying it?

It was reduced to $5785.00.

Q. Will you explain why it was reduced?

I cannot explain that. I do not know.

Q. Have you any means of finding out?

I don't know that I have, at command. I can make an endeavor to find out, but I don't know anything that would show.

Q. This amount of $5785.00 was carried as the cash of the bank?

As part of the cash of the bank.

Q. It was not placed to the order of Mr. John A. Wisherd on the books of the bank, was it?

80 No, it was not placed to his order on the books of the bank.

Q. Now, how long did it continue to be so carried?

Until the 29th day of January, 1887. The 30th, the memorandum says, but the 30th was Sunday.

Q. After the date when this ceased to be carried as a cash item, the agreement between Mr. John A. Wisherd and Mr. John R. Clark, cashier of the First National Bank was entered into, was it not?

Yes, sir.

Q. Regarding your testimony relative to the ability and willingness of the bank to pay the amount of these alleged tenders, is not the fact that your testimony is intended to show that the bank was financially able, and was willing to carry out the agreement which it had entered into with Mr. Wisherd, to advance for Mr. Wisherd to such person or persons as Mr. Wisherd indicated, the amounts represented by these alleged tenders?

Yes, that is true. You want to limit the time?

Q. Up to the 29th day of January, 1887?

Yes, sir.

Q. That is all you wish to be understood as testifying to, that the bank was financially able, and willing to cary out the agreement with Mr. Wisherd to pay the sums of these alleged tenders to such person or persons as Mr. Wisherd should indicate?

Yes, sir.

Q. That is, they were willing to advance to Mr. Wisherd, for the specific purpose for which he had agreed with them, the sums of these alleged tenders.

Yes, sir.

Q. The agreement was between the bank and John A. Wisherd, was it not?

Yes, sir.

Q. In this matter the bank was represented, you say, by Mr. John R. Clark?

Yes, sir.

81 [—] At that time its cashier?
Yes sir.
Q. Do you know whether or not there was any written instrument prior to the time of exhibit H, betwen the bank and Mr. Wisherd relative to this matter?
Not that I know of.
Q. Did you ever see or know of such an instrument?
No, sir.
Q. Referring to exhibit H and I, I will ask you if you are familiar with the signatures attached thereto?
Yes, sir.
Q. Do you know the handwriting and signature of John A. Wisherd?
Yes, sir.
Q. Do you know the handwriting of John R. Clark?
Yes, sir.
Q. You may state whose signatures are attached to exhibit H?
John A. Wisherd. John R. Clark, cashier.

Respondent Cheney offers in evidence exhibits H. offered by the complainant.

Q. Referring to exhibit I, whose signature is attached to that?
John A. Wisherd.
Q. And whose signature is that as witness?
John R. Clark.

Respondent Cheney offers in evidence exhibit already offered by complainant, and identified as exhibit I.

Q. Referring to the contract attached to exhibit I, I will ask you if you are familiar with the signature of P. D. Cheney?
No, sir.
Q. You are not familiar with that signature?
No, sir.

82 It is admitted that the signature to the contract attached to exhibit I. is the signature of P. D. Cheney, and that that is the original contract and agreement.

Q. Did you know of the taking of money from the First National Bank to Tecumseh and elsewhere to be used in taking alleged tenders in this matter?
Yes, sir.
Q. Did the persons going to Tecumseh always take with them from the First National Bank the amount of money which they supposed would be necessary to make these alleged tenders?
Not always.

Q. In how many instances did they take a less amount than the amount which had been figured would be necessary?

I do not know.

Q. Was not it a usual thing that they took only a part of the money, and relied on getting money from the Tecumseh National Bank or the banking house of Russell & Holmes with which to make up enough funds to make the alleged tender?

That was done in some cases.

Q. When that was the case, would all of the money be brought back by the person, or would they return to the banking house from which they had borrowed the funds, the amount which they borrowed?

The money borrowed from the house in Tecumseh would be returned to them.

Q. Is it not a fact that in some instances a portion of the money that was taken from the First National Bank to Tecumseh for the purpose of making these alleged tenders would be, by the person taking it there, acting for the First National Bank of Lincoln, turned over to the banking house at Tecumseh to be used by them and charged to their account with the First National Bank of Lincoln?

I do not know that that was done.

83 Q. You will not swear that it was not done?

No, sir.

Q. You had an account with the Tecumseh National Bank, did you not?

Yes, sir.

Q. And with the banking house of Russell & Holmes?

Yes, sir.

Q. Regarding any of these alleged tenders to which you have testified, was the fact true as stated, regarding the borrowing of money of some banking house in Tecumseh. That is, was it done in any instance prior to 1887?

I do not know that it was.

Q. It was done subsequent to that time?

Well, my testimony is not sufficient in that case, I don't know anything personally about it.

Q. You testified that you knew of money being taken down there to make the tender?

Yes, I know that money was taken down there, but I don't know in how many instances it was, nor—

Q. Now, when this money would be taken out of the First National Bank for this purpose, how long would it be away from the bank?

Probably about three days.

Q. Would that be any more than the length of time necessary for your messenger to take the money to Tecumseh and return, counting one day for the tender?

No, sir, I think that would be about right. He would take the money and go down to Tecumseh with it one day.

Q. And then would be there the next day to make the alleged tender?

Yes, sir.

Q. And would return the following day?

Yes, or he might have been able to make the tender and come back the same day.

84 Q. He would come back as soon as he could after making the tender? He would come back with the money?

Yes, sir.

Q. Unless it was devoted to some other purpose, like leaving it with the banks for their use, if they needed the money?

Yes, sir.

Q. There was never any of this money deposited in the banking house of Russell & Holmes for the purpose of making this tender good?

Not that I know of.

Q. Do you remember of having the money at Tecumseh, and making the alleged tender in 1891?

No, I don't remember anything of that.

Q. You could not swear as to that?

No, I could not swear positive.

Q. You don't know whether all the money was taken from the bank at that time or not?

No, sir.

Q. Did you ever receive, or did the bank ever receive a communication from Russell & Holmes relative to this matter of Russell & Holmes supplying the money to make the alleged tenders with?

Yes, sir.

Q. I hand you exhibit I, and ask you to state what it is?

A letter from the banking house of Russell & Holmes of Tecumseh, Nebraska, to D. D. Muir, assistant cashier of the First National Bank of Lincoln, Nebraska.

Q. Are you familiar with the signature of Russell & Holmes?

Yes, sir.

Q. Whose signature is attached to that letter?

Russell & Holmes.

Q. In whose handwriting is the letter and signature?

I can't answer that. I don't know which ones it is.

85 Q. Have you read this letter?

Yes, sir.

Q. And know its contents?

Yes, sir.

[—] Does it refer to the transaction relative to the alleged tenders made in this matter?

Yes, sir.

Respondent Cheney offers in evidence exhibit 1, and a copy of the same is hereto attached, marked exhibit 1, and made a part of this deposition.

Q. Will you allow a copy to be taken of this letter and attached to your deposition and made a part thereof, the original to be produced upon the hearing of this case?

Yes, sir.

Complainant objects to the introduction of this exhibit as incompetent, irrelevant and immaterial, and as coming from the agent of respondent.

Q. I now hand you exhibit 2, a letter, and I will ask you to state, if you know, in whose handwriting that letter and signature is?

Yes, sir.

Q. Are you familiar with the writing of Oscar Callihan?

Yes, sir.

Q. In whose handwriting is that letter and signature?

Oscar Callihan's.

Q. What official position did he have with the First National Bank of Lincoln, Nebraska, at the time that letter was written?

None.

Q. Where was he then living?

In Tecumseh.

Respondent Cheney offers in evidence the letter identified by witness and a copy of the same is hereto attached, marked exhibit 2, and made a part hereof.

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Q. Will you consent that a copy of this letter shall be made and attached to your deposition, and to produce the original at the hearing of this case?

Yes, sir.

Q. Mr. Lippincott, I notice the two notes testified to by you, one of date May 3, 1885, and one May 18, 1886, are marked paid on the 27th day of April, 1887. This was in satisfaction of these notes, was it not?

Yes, sir.

Q. You mean that the stamp paid refers to the cancellation of these notes?

Yes, sir.

Q. Did the bank receive any money when those notes were paid? Is it not a fact that those notes were simply an evi-

dence of the indebtedness which would be created if those alleged tenders were accepted?

Yes, sir.

Q. And that when a new arrangement was made, the notes were cancelled?

I guess that is true.

Q. The bank never did pay out any money either to Mr. John A. Wisherd or to anybody else for those notes, did they?

No, sir.

Q. The notes were simply given as an evidence to the bank, in the event that any of the alleged tenders were accepted?

Yes, sir.

Q. And when the agreement of date April 26- was entered into, those notes were cancelled and marked paid?

Yes, sir.

Q. (Handing witness exhibit C), I hand you exhibit C being a draft for $5800.00 drawn by John A. Wisherd on Nash & Dike, Skidmore, Missouri, and I will ask you if you know anything about how long that has been in the possession of the bank. Was it surrendered when the notes were cancelled?

87

No, sir. I am not familiar with this draft.

Q. Could you state whether or not it has been in the possession of the bank at any time?

Yes.

Q. Examine it and see if it has been in the possession of the bank at any time.

Yes, sir, it is one of the bank's blank forms. That is, it is made out on one of the bank's regular form blanks.

Q. Is there anything else to show that it has been in the bank's possession? The First National Bank of Lincoln, Nebraska?

The writing of the person who drew up the draft shows it to have been.

Q. By whom is this draft drawn?

John R. Clark, cashier of the bank.

Q. Is there anything aside from that to show that this has been in the possession and custody of the bank?

No.

Q. If this had ever been placed in the assets of the bank, would there not be some mark or indication as to where a record of it may be found?

Yes, sir.

Q. Was that draft ever paid, or presented for payment, to any person?

I do not know that it was.

Q. Do you find anything to indicate that this has ever been presented to, or paid by any person?

I have never made any examination of the records to know whether it ever went out of the bank or not.

Q. Can you find any evidence or presentation or payment on the draft itself?

88 No, sir.

Q. Would it not be indicated on the draft itself if it had been presented or paid?

Complainant objects to the question as incompetent, as the draft itself would show.

A. Having been drawn on a foreign town it would be proper that the indorsement of the bank appear on it if it had been forwarded for collection.

Q. The indorsement of the bank does not so appear, does it?

No, sir.

Q. Do you know anything relative to the persons upon whom this draft is drawn, Nash & Dike of Skidmore, Missouri?

No, sir.

Q. The bank has never received anything on that draft, has it?

No, sir. Not that I know of.

Q. Does it appear among your bills receivable or as part of the assets of the First National Bank of Lincoln, Nebraska?

No.

Q. Are the two notes referred to as exhibits D. and E. in the care and custody of the bank, or a part of its filings?

No, sir.

Q. From whom did the bank receive them, and at what time, since it parted with their keeping?

From R. W. Sabin of Beatrice.

Q. The gentleman here representing the complainant as an attorney?

Yes, sir.

Q. And when were they given to the bank by him? Or about when?

About the 5th of December, 1884. They were given to me to look up some memoranda.

Q. Regarding the taking of money from the bank with which to make the alleged tender of May 1891, I wish to

89 ask you when that money was taken away from the First National Bank?

I cannot testify as to that.

Re-direct Examination.

By Mr. Sabin:

Q. I will ask you if this exhibit K. is one of the papers belonging to the First National Bank, and now in the possession of the bank?

Yes, sir.

Q. You may state, Mr. Lippincott, whether the bank, since this exhibit K. was received by it, lays any claim, or holds the other security, exhibits H. and I. and whether the bank now has any claim upon the contract by virtue of these exhibits since receiving exhibit K.?

No, sir. That is for any moneys due the bank or owing to the bank.

Q. Are you willing to allow the original of exhibit K. to be attached to your deposition?

No, sir.

Q. Will you permit the notary to take a copy of this draft and attach it to your deposition?

Yes, sir.

Complainant offers the draft about which witness has testified in evidence and asks the notary to make a copy of the same and attach it to this deposition, and a copy of the same is hereto attached, marked exhibit K and made a part of this deposition.

Re-Cross Examination.

By Mr. Magoon:

Q. Do you know when the bank received this exhibit K?

About the 25th or 26th of April, 1889.

Q. Don't you know that it is a fact that both Mr. MacFarland, the president of the bank, and Mr. Callihan, the cashier at that time of the bank, stated on or about that date or a very few days after its receipt and after the tender was made to Russell & Holmes on the 2nd day of May, 1891, that
90 they had intended to send this draft back and supposed it was sent back?

I don't know.

Q. You don't know?

I don't know about that, no, sir.

Q. Do you not know that the sending or any use of this draft, and especially the returning of it to the source from whence it came was prevented by an injunction from the District Court of this State?

I don't know.

Q. Was not that the reason why the draft was not returned to the sender thereof?

I do not know.

Q. And was it not subsequently retained by reason of the demand of one Susan B. Alden, made through her attorneys?

Yes, sir.

Q. Now do you still say that the First National Bank of Lincoln, Nebraska, owns this draft?

No, I would not say that the bank owns the draft, it is held by the bank under the order of the court.

Q. The bank makes no claim upon that draft or its proceeds, does it?

No, sir.

Respondent Cheney objects to the introduction of said draft identified as exhibit K in evidence herein, for the reason that the same is incompetent, irrelevant and immaterial.

Re-Direct Examination.

By Mr. Sabin:

Q. Mr. Lippincott, did you have anything to do with the arrangements when this draft was obtained?

No, sir. That is, the arrangements for obtaining the draft?

Q. Yes, and for getting the draft?

91 No, sir, I had nothing to do with the arrangements.

Q. In whose handwriting is this draft made?

I am not familiar with it.

Q. And you do not know what arrangements were made by which the draft stayed here, do you, prior to June 2, 1892?

No, sir.

Q. You may state whether you know of any reason why the draft should have been sent back—in fact up to this time, even if an injunction had not been served on the back and the bank had not been notified?

A. I know of no reason why it should not lie in the bank and be held for the purposes for which it was originally drawn. The bank would not feel justified at this time, in advancing money for a draft issued so long a time since as July 24, 1891.

Q. You may state, in case the money should be called for, the amount of the draft, would you pay the money if you ascertained that the draft was good at this time.

The bank would not feel justified in paying out so large a sum of money without having first received it.

Q. I will ask you then, whether you know anything about the tender of 1891 being made upon the strength of that draft?

I believe it was.

Re-Cross-Examination.

By Mr. Magoon:

Q. Will you state why the draft marked exhibit K was not returned after the 2nd day of June, 1892?

It was held here because of an order given by C. E. Magoon, attorney for Susan B. Alden, in the Wisherd-Bilby case.

Q. Did you make any memorandum relative to that requirement on behalf of Susan B. Alden?

I made it at the date the notice was received.

Q. Have you the memorandum you made at that time?

92 Yes, sir.

Q. Handing you exhibit 3, I will ask you if that is the memorandum?

Yes, sir.

Q. Did you make it at the time of receiving the notice?

Yes, sir.

Respondent Cheney offers in evidence the memorandum identified by witness, and a copy of the same is hereto attached, marked exhibit 3, and made a part of this deposition.

Q. Will you permit a copy of said memorandum to be made and attached to your deposition and made a part thereof, and produce the original at the trial of this case?

Yes, sir.

Q. Was there any other reason why this draft was retained aside from the notice received from Susan B. Alden?

Not that I know of.

Q. If called upon so to do, would the bank cash this draft at this time?

No, sir.

Q. Would it have done so any time in the year 1894?

No, sir.

Q. Would it have done so any time in the year 1893?

I think not.

Q. Would it have done so any time in the year 1892?

I think not.

Q. Would it have done so any time after the 2nd day of June, 1891?

I am not prepared to answer that question.

Q. Would it have done so at any time late in the year 1891?

As to that I am not prepared to testify.

Q. Did you ever cash this draft?

No.

[—] Did the person to whose order this draft is drawn ever indorse it?

93 No, sir.

Q. Would it have been paid without his indorsement?

I presume not.

Q. Would the First National Bank of Lincoln, Nebraska, have advanced any money on this draft without the indorse-

ment of the person to whose order it was drawn?

No, sir.

Q. Is it not a fact that this draft was never in the possession or the keeping of the First National Bank of Lincoln, Nebraska, except as a collateral for some other agreement or arrangement?

I believe at the time this draft was received the bank was willing and ready to advance the money for the draft.

Q. Did it ever have an opportunity of so doing?

I believe not.

Q. How soon, in the ordinary course of business, would this draft have been returned after the alleged tender made in Tecumseh was refused?

With no instructions to the contrary the draft would have gone back the following day.

Q. Were there any instructions to the contrary, to your knowledge, in this case?

Not that I know of.

Q. The bank had no further use or claim upon the draft after the alleged tender was refused?

No, sir.

Re-Direct Examination.

By Mr. Sabin:

Q. As a matter of fact, Mr. Lippincott, you do not know really what arrangements were made in relation to that draft?

I do not know what the arrangements between Mr. MacFarland and Mr. Wisherd were. I do not know what their conversation was.

Q. Or Mr .Bilby?

94 No, sir. I am not familiar with their conversation.

Q. You do not know how long the draft was really to remain here, do you, at the time the arrangements were first made?

No, sir.

CHARLES S. LIPPINCOTT.

EXHIBIT A.

E. H.

Copy.

Wells, Fargo & Co's. Express.
From Lincoln, Neb.

No. 5785.
Sept. 11-1886.
Hanna.

$5,785. May 18-1885. Chgs————

Left in First Nat'l Bank of Lincoln, by J. A. Wisherd to be delivered to Prentiss D. Cheney or order on call or Russell & Holmes of Tecumseh, or P. D. Cheney's attorneys for him.

28. "A"

EXHIBIT B.

E. H.

Copy.

Tendered to M. & W. 5/- M.
Tendered Russell & Holmes, Tecumseh, Neb. May 4-86. Platt.

28 "B"

EXHIBIT C.

Copy. E. H.
$5800. Lincoln, Nebraska, May 5th, 1885.
Pay to the order of
First National Bank of Lincoln, Neb.
Five thousand Eight hundred dollars, value received, and charge to the account of With Ex. on N. Y. or St. Joe.

JOHN A. WISHERD.

To Nash and Dike,
Skidmore, Mo.

First National Bank,
Lincoln, Nebraska.
Draft for customer's use.

28 "C"

95 EXHIBIT D.

Copy. E. H.

Lincoln, Nebraska, May 18, 1885.

$5.785.

On demand after date, for value received, I promise to pay to the order of the First National Bank of Lincoln, Nebraska, Five thousand seven hundred and eighty-five dollars, with interest at the rate of five per cent per annum from date until paid.

JOHN A. WISHERD.

Collateral certificate deposit this bank 5785 and land contract for land in Gage Co. Neb. from P. D. Cheney of Jerseyville, Ill.

Negotiable and payable at the First National Bank of Lincoln, Neb.
No. 25151 Due——1885.

Paid. Apr. 27 1887, The First National Bank, Lincoln, Neb.

C. D. 32782
P. O. Address,
Dawson, Mo.

28 "D"

Endorsed: 543.00 or int. a/c Apr. 28/87

EXHIBIT E.

Copy. E. H.

$2566. Lincoln, Nebraska, May 3d, 1886.

On demand after date, for value received, I promise to pay to the order of The First National Bank of Lincoln, Nebraska, Twenty-five hundred and sixty-six dollars, with interest at the rate of five per cent per annum from date until paid.

JOHN A. WISHERD.

Paid April 28 1887 The First National Bank of Lincoln

Collateral certificate of deposit of this bank for $2566 and land contracts for land bought of P. D. Cheney in Gage Co.

P. O. Address
C. D. 37464.

Negotiable and payable
at the
First National Bank of Lincoln, Neb.
No. 30700 Due May 3/6, 1886.

28 "E"

Endorsed: 128.00 or Int. a/c Apr. 28/87.

96 EXHIBIT F.

E. H.

Copy.

Clerk's Office,
U. S. Circuit Court,
District of Nebraska,
Elmer D. Frank,
Clerk.

HON. DAVID J. BREWER,
U. S. Circuit Judge.
HON. ELMER S. DUNDY,
U. S. District Judge.

To First National Bank, Lincoln, Nebraska.

Lincoln, Neb. Jan. 21st, 1887.

List of notes given to P. D. Cheney, which must be delivered to the bank by Cheney, or his agent. or atty. when money is demanded, [mnamely]:

One note for	$1886.73,	dated May 2nd 1881,	due three years	after	date.		
" " "	1886.73,		" four (4) "	"	"		
" " "	1886.73,		" five (5) "	"	"		
" " "	705.63,		" three (3) "	"	"		
" " "	792.43,		" four (4) "	"	"		
" " "	679.23,		" five (5) "	"	"		

I. P. I. P. Int. Prin. Int. Inst. | Principal notes.

All above dated May 2nd, 1881. When these above described notes are delivered to you pay out the amount of money now with you for Cheney, $8351.....

Notes due May 2nd, 1887 { One 1886.73 / One 566.03 } $2452.76

.....

Notes due May 2nd, 1888, { One 1886.73 / " 452.83 } 2339.56

.....

Notes due May 2nd, 1889, { One 1886.73 / " 339.63 } 2226.36

.....

Notes due May 2nd, 1890, { One 1886.73 / One 226.43 } 2113.16

.....

Notes due May 2nd, 1891, { One 1886.73 / One 113.23 } 1999.96

.....

97 All above described notes dated May 2nd, 1881. The above amts. due each year from 1887 to 1891, must be tendered to Russell & Holmes, at Tecumseh, Nebr. on the

5th day of May of each year in gold. The amount due at that date of the several respective years.

JOHN A. WISHERD.

28 "F"

EXHIBIT G.

E. H.

(Stamped) First National Bank,
Lincoln, Neb.
May 7, 1887.

Copy. RECEIVED.

Jas. D. Russell. C. A. Holmes. W. H. Holmes.
Russell & Holmes,
Bankers.

Tecumseh, Neb. May 6, 1887.

D. D. Muir, Esq.
Cashier.

Dear Sir: In the matter of Wisherd v. Cheney we have not seen or heard from the notes due May 2-5.

Mr. Callihan made the tender and offered to pay the notes as suggested by you.

Yours truly,
RUSSELL & HOLMES.

28 "G"

EXHIBIT H.

Copy. E. H.

1788

John Fitzgerald, President. John R. Clark, Cashier.
D. D. Muir, Ass't Cashier.
The First National Bank.

Lincoln, Neb. Apr. 26, 1887.

It is understood with John A. Wisherd that while his suit is pending in Court we will endeavor to make him loans from time to time as his payments become due to P. D.
98 Cheney under the contract herewith, in order to tender the money, for his benefit, and if the money is not used longer than three days at a time, he is to pay us the sum of one hundred dollars per annum from this date, and expenses, for our commission. If the money is used longer than three days at a time he is to pay interest on same, at the rate of ten per cent. per annum for the time it is used.

JOHN A WISHERD,
JOHN R. CLARK, Cr.

28 "H".

EXHIBIT I.

E. H.

Copy.

1798.

John Fitzgerald, President. John R. Clark, Cashier.

D. D. Muir, Cashier.

The First National Bank.

Capital
$200,000.00

Surplus
$45.000.00

Lincoln, Neb. April 27, 1887.

In consideration of the receipt of one dollar, and other valuable considerations, I hereby assign, set over and transfer to the First National Bank of Lincoln, Nebraska, all my right, title and interest in and to the accompanying contract, as collateral security for the payment of my obligations to the said First National Bank, for any moneys that may hereafter be received by me from said bank, or advanced by said bank on this contract.

JOHN A. WISHERD.

In presence of
JNO. R. CLARK.

This assignment to be removed if contract is taken into Court.

CLARK.

28 "P".

99 EXHIBIT J.

Copy. E. H.

Jas. D. Russell. C. A. Holmes. W. H. Holmes.

Russell & Holmes, Bankers.

Tecumseh, Neb., May 5, 1888.

D. D. Muir, Esq.,
Cashier.

Dear Sir: We acknowledge the tender of $2339.56 by your Mr. P. S. Chapman to pay the notes of J. A. Wisherd given to P. D. Cheney, due May 2/5 1888.

The notes are not in our possession. We hold the money to them in case the notes are presented for payment during the day.

Respectfully,

RUSSELL & HOLMES.

(Stamped.) First National Bank, Lincoln, Neb.
May 7, 1888.
RECEIVED.

28 "J".

EXHIBIT K.

E. H.

J. S. & J. E. Bilby & Co.

Customer's Draft.

$19512. Quitman, Mo., Apr. 24, 1891.

Sight Pay to the order of Oscar Callihan, Nineteen Thousand Five Hundred Twelve Dollars, with Ex. & Collection. Value received. Charge to account of

JOHN S. BILBY.

To J. S. & J. E. Bilby & Co.
Quitman, Mo.

Certified April 24th 1891 for 19512 N. V. Bilby, Cashier.

28 "K."

100 EXHIBIT I.

E. H.

Copy.

Jas. D. Russell. C. A. Holmes. W. H. Holmes.

Established 1871.
Bank of
Russell & Holmes.

Tecumseh, Nebr. Apr. 29, 1889.

D. D. Muir, Esq.,
Cashier.

Dear Sir: In reply to your favor of 27th inst. we say you need not send any money to make the tender to Cheney for Wisherd. We have the legal tender that you will require and will furnish them for the purpose you name.

If you send some one down to make the tender let him bring a C/D or cashier check so the transaction will be bona fide. Cheney may put us on the witness stand sometime.

Yours truly,

RUSSELL & HOLMES.

28 "L."

EXHIBIT 2.

E. H.

Copy.

Oscar Callihan. A. C. Sullivan.

Office of
Callihan & Sullivan,
Dealers in Dry Goods, Clothing, Boots & Shoes.

Tecumseh, Neb., May 6, 1887.

John R. Clark,
Lincoln, Neb.

Dear Sir: I went to the bank of Russell & Holmes yesterday (May 5th) and made a tender to them of two thousand four hundred and seventy-two 76/100 ($2472 76/100) dollars, in payment of the two notes described in your letter of the 4th inst.

"One for eighteen hundred and eighty-six 73/100 ($1886 73/100) dollars and one for five hundred and sixty-six 03/100
101 ($566.03/100) dollars, both signed by J. A. Wisherd and payable to the order of P. D. Cheney."

The notes, they said, were not in their possession. I left the money there during the afternoon, and until to-day, but they were not presented.

The offer was made in "legal tender" obtained as you directed. and being needed has been returned.

Respectfully,

OSCAR CALLIHAN.

(Stamped.) First National Bank,
Lincoln, Neb.
May 7, 1887.
Received.

28 "M."

EXHIBIT 3.

E. H.

Copy.

C. E. Magoon, atty. for Susan B. Alden in Wisherd Bilby case, gives notice to hold check, as they intend to appeal case.

June 2, 1892.

28 "N."

John D. MacFarland, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposes and says as follows, viz:

Q. State your name?
A. John D. MacFarland.
Q. Age?
A. Forty-eight.
Q. Place of residence?
A. Lincoln, Nebraska.
Q. Occupation?
A. I am not in a special business at present.

Q. What connection, if any, did you have with the First National Bank of Lincoln, Nebraska, in the year 1891?

A. I was president of the bank during that year.
102 Q. During the whole year, or what portion of it?
A. The whole of '91, yes, sir.

Q. You may state, Mr. MacFarland, what you had to do in regard to making a tender for John S. Bilby, the complainant, at Tecumseh, Nebraska, during the year 1891, in the month of May?

A. Well, the only thing I had to do with making that tender was to instruct the cashier of the bank, Mr. Callihan, to go to Tecumseh and make the tender.

Q. You instructed him to make it?

A. Yes, sir, I know I did, by reference to memoranda and papers that are here. It was $19,512.00.

Q. You may state upon what security you had the tender made?

A. The tender was made on the strength of a draft for that amount of money, that was sent to Mr. Callihan, who was cashier for the First National Bank of Lincoln.

Q. Is that the draft you have in your hand? (Referring to exhibit K. of Mr. Lippincott's deposition.)

A. Yes, sir.

Complainant offers the draft in evidence, the same being exhibit K. attached to Mr. Lippincott's deposition in this case, and the said exhibit K. is here referred to.

Respondent Cheney objects to this introduction as incompetent, irrelevant and immaterial.

Q. You may state, Mr. MacFarland, what is the letter that you now have in your hand?

A. This [—] a letter purporting to be from Russell & Holmes of Tecumseh, Nebraska, addressed to Mr. Callihan as cashier.

Q. Mr. MacFarland, I will ask you if you saw that letter at or about the time it was received?

A. I have no doubt that I did sir, because a letter of that nature would come to my attention, but at this time I have no recollection of having seen it. It bears the stamp of having been received at the bank the 4th day of May, 1891, and

103 I have no doubt that I saw it.

Q. Do you know by looking over the contents of the letter whether it has reference to the tender you ordered Mr. Callihan to make with reference to that draft?

A. Yes, sir, it refers to that matter entirely.

Q. You may state in whose possession the letter has been kept since that time?

A. In the possession of the First National Bank, so far as I know.

Q. From whom did you receive it?

A. From Mr. Lippincott, assistant cashier of that bank.

Q. At what time?

A. Just at this time, a few moments ago.

Complainant offers in evidence the letter identified by the witness, and asks the notary to make a copy of the same and attach it to this deposition. A copy of the same is hereto attached, and marked exhibit A, and made a part of this deposition.

Q. Are you willing, Mr. MacFarland, for the notary to make a copy of this letter, and attach it to you- deposition?

A. I have no objection to the notary making a copy and attaching it.

Respondent Cheney objects to the introduction of this letter in evidence, as incompetent, irrelevant and immaterial.

Q. I will ask you, Mr. MacFarland, if you have another letter or telegram of this date, or a few days after, from Russell & Holmes, in regard to Mr. Cheney being at Tecumseh?

A. Yes, sir, here is a telegram.

Q. Mr. MacFarland, you may state whether you received that telegram at or about this date?

A. Yes, sir. I believe I have a clear recollection of receiving that telegram.

Complainant offers in evidence the telegram identified by witness and by permission a copy of the same is hereto attached, marked exhibit B. and made a part of this deposition.

104 Respondent Cheney objects to the introduction of this telegram as incompetent, irrelevant and immaterial.

Q. Do you remember, Mr. MacFarland, about seeing Mr. Cheney, the respondent, at your bank shortly after this time? If so, state about the time?

A. Yes, sir, Mr. Cheney called on me about that time, I should think about the month of May, but the exact date I don't know. I could fix it from my former testimony, if necessary.

Q. It was after this date, I suppose?

A. Yes, sir, Mr. Cheney called on me early in the month of May, 1891.

Q. State the conversation as near as you can, that you had with him at that time.

A. Well, I could not undertake to recite the conversation because that is a good while go, but Mr. Cheney came here to talk with me about this matter. He inquired, as I now remember, if he could still get the money that had been tendered, and to the best of my recollection I told him that he could if he would make a deed and surrender the note Mr. Wisherd had given. He came in twice I think. He went out to consult his attorneys, and came back again. That is the substance of our conversation.

Q. Did he ask for the money at any of those conversations?

A. I don't think he did.

Q. Did he make any demand for any at that time?

A. No, sir.

Q. He merely asked if you would pay out the tender as made?

A. That is the best of my recollection, yes, sir.

Q. And you told him that you would?

A. Yes, sir.

Q. You may state, Mr. MacFarland, whether Mr. Bilby called here in person to arrange with regard to this draft, if you remember?

A. Do you mean before the receipt of the draft?

Q. Yes, or about that time?

105 A. No, I never saw Mr. Bilby until some time after this transaction.

Q. Did you have any connection with this matter prior to this year of 1891?

A. I did not sir.

Q. And you know nothing about it except what the papers here might indicate?

A. I knew nothing of it prior to that time at all.

Q. What you have stated is about all the connection you had with it, Mr. MacFarland?

A. Yes, sir.

Cross-Examination.

By Mr. Magoon.

Q. Mr. MacFarland, I will ask the notary to read you the question as to the person for whom this tender of May, 1891, alleged to have been made at Tecumseh, Nebraska, to Russell & Holmes, was for?

(Question read as follows:) You may state, Mr. MacFarland, what you had to do in regard to making a tender for John S. Bilby, the complainant, at Tecumseh, Nebraska, during the year, 1891, in the month of May?" And I will supplement that question, by asking you if you did anything for John S. Bilby at that time, or if you had any arrangement with John S. Bilby for what was done at that time, and if not, to state who the person was for whom you made the tender, and with whom you made arrangements.

A. The draft for the money to make the tender was sent to this bank by John S. Bilby. The previous arrangement for making the tender, however, had been made with John A. Wisherd.

Q. In whose name and on whose behalf did you make the tender alleged to have been made in May, 1891, at Tecumseh?

A. It was made in the name and behalf of John A. Wisherd.

Q. Did you have any money or funds of John A. Wisherd or John S. Bilby in the First National Bank at any time
106 during your presidency, excepting as represented by this draft?

A. We did not.

Q. Did you have any money depositeed there with which to keep this tender or these tenders good, either as a special deposit or in a general account, for or on behalf of John A. Wisherd or John S. Bilby, excepting this draft?

A. We did not sir, during my connection with the bank.

Q. The only funds that were ever placed at your disposal in this matter, was this draft?

A. That was all.

Q. Would the bank at this time advance $19,512.00 on this draft?

A. I am not an officer of the bank now, and cannot speak for it, but I should say that no bank would pay out the money on a draft as old as that one is.

Q. When did your connection with the First National Bank case?

A. The 1st of June, 1892.

Q. Would you, as president of that bank, at any time during the year 1892, have advanced money upon this draft.

A. No, sir.

Q. Would you have allowed the bank to advance $19,512.00, or any part thereof, on the faith and credit of this draft, during the year 1892?

A. No, sir. I should have insisted upon a new draft being furnished, or money in some other shape, because it had passed the time when it could probably be collected legally.

Q. When did you receive this draft? Can you fix the date?

A. No, I can't fix the date, but about the 1st of May, 1891, the latter part of April or the first of May.

Q. After the alleged tender was refused was the draft returned to the source from whence it came?

A. No, sir.

107 Q. Why was it not returned?

A. The bank had been advised by Mr. Holmes of Russell & Holmes at Tecumseh, that Mr. Cheney was there and was coming here. I should have [hais] I was advised. I guess it was addressed to me—he was coming here to see about the matter. Therefore it was not returned until he arrived, and about that time garnishment suit was commenced and we were ordered by the court to hold it. I suppose I should say garnishment proceedngs.

Q. Also injunction process, was there not?

A. Yes, sir, I think there was. I might have said the bank was enjoined from returning it.

Q. Did the bank, after the time of the refusal of the tender, lay any claim to ownership or to property rights of any kind or character in and to this draft?

A. It did not.

Q. Did it at any time have any rights of ownership in and to this draft unless the tender was accepted?

A. No, sir.

Q. This draft was sent to you to supply the money to make the tender?

A. Yes, sir.

Q. And upon the tender being refused was to be returned to the person who sent it, and would have been so returned had not the bank been enjoined therefrom, or restrained?

A. Yes, sir.

Q. Does the bank now, or has it at any time, to your knowledge, made any claim of ownership or property rights in and to this draft?

Respondent objects to the question as not proper cross-examination.

A. No, sir, it never did to the best of my knowledge.

Q. When did you enter this bank?

A. About the 1st day of September, 1890. I think I was elected president to take effect on that day.

108 Q. At that time Mr. John R. Clark had died, had he not?

A. Shortly before that, yes, sir. Sometime during August.

Q. How long had Mr. Muir been in the bank when you became president?

A. He was not here when I became president at all.

Q. He had ceased to have any connection with this bank?

A. Yes, nearly a year before that, as I remember.

Q. When was this matter of a tender in this transaction here involved first brought to your attention. State as near as you can recollect?

A. I think within a short time—perhaps 30 days or longer, prior to the time when the tender was made in 1891.

Q. Then it would be sometime in the early part of the month of April?

A. Yes, sir, perhaps before that. Not a great while before that time.

Q. At that time you may tell what you stated and to whom you stated it, in relation to the bank making the tender?

A. My recollection is that Mr. Callihan, or possibly Mr. Miller, who was the teller in the bank, brought my attention to the matter and explained what had been done in previous years, and that it was necessary to make another tender, and

I, as I now recollect the facts, wrote or Mr. Callihan wrote to Mr. Wisherd and told him this final tender was to be made; that it was a large sum of money, and we wanted his to provide the funds and have them here at the time the tender was to be made.

Q. That the bank was not willing to advance the money?

A. Yes, sir, I told him in my opinion it would be necessary to make a tender of the full amount due, and that was more money than we would care to advance in one sum.

Q. And he would have to make additional arrangements with you to make that tender?

A. I told him he would have to have the funds here to make it with.

Q. Have you a copy of that letter? Is there a copy of that letter in existence?

109 A. I presume there is among the records of the bank.

Q. Will you make a search therefor, and allow the notary to make a copy and attach it as a part of your deposition?

A. Yes, sir, as far as I am concerned, I have no objection.

Q. Did Mr. Wisherd call upon you in response to that letter?

A. I think he did. He was here once that season and my present recollection is that he called upon me in response to that letter.

Respondent Cheney offers in evidence the letter identified by the witness, and a copy of the same is hereto attached, marked exhibit 1. and made a part of this deposition.

The complainant objects to the introduction of this letter as incompetent, irrelevant and immaterial.

Q. After he called did you receive this draft here in question?

A. Yes, sir. Well, the draft came to the bank, to Mr. Callihan, who was cashier.

Q. Was there a letter accompanying that draft?

A. Yes, sir. The bank officers tell me they are unable to find the original copy of that letter.

Q. Have you a copy of that letter?

A. I have a copy that was in my testimony in a former case.

Q. Is that the case of Mrs. Alden against the bank and others to get possession of this draft?

A. Yes, sir.

Q. I will ask you to read that letter to the notary.

It is agreed between complainant and respondent that the oral testimony of the witness shall be taken in lieu of the original letter.

Witness reads. "J. S. Bilby, President. N. V. Bilby, Cashier. Capital Stock $20.000.00. Organized in 1885. J. S. & J. E. Bilby, Bankers.

Quitman, Mo. April 24, 1891.

Oscar Callihan,
Cashier,
Lincoln, Neb.

110 Dear Sir: Enclosed find certified draft J. S. Bilby & J. E. Bilby for $19,512.00 as tender in the Cheney case. If draft is accepted please wire me immediately.

Very respectfully,

JOHN S. BILBY."

Q. Who went to Tecumseh to make the alleged tender in May 1891?

A. Mr. Callihan, cashier of the bank.

Q. Do you know what day of the month he went?

A. No, sir.

Q. Was it not on the second day of May?

A. I could not say definitely. Of course you would have to refresh one's memory. The presumption is it was on the second day of May, because the written declination of the tender on the part of Russell & Holmes, is dated on the second of May, 1891.

Q. When you received this notice of the refusal of the alleged tender did you take any steps to notify Mr. Wisherd, Mr. Bilby or their legal representatives in regard thereto?

A. My present recollection is that I wrote Mr. Bilby as soon as the matter was definitely settled, advising him also of the injunction proceedings in the case of Alden v. Bilby and others.

Q. Did he tell you who his attorney was in this matter?

A. Mr. Bilby?

Q. Either Mr. Bilby or Mr. Wisherd?

A. Yes, Mr. Wisherd had told me before that Judge Lake, of Omaha, was his attorney, as I now recollect it.

Q. After the visit of Mr. Cheney here, after you learned Mr. Cheney was to make a visit, did you notify Judge Lake of his coming?

A. No. After I had been advised that Mr. Cheney was in Tecumseh, by Russell & Holmes,—That he was in Tecumseh with the Wisherd's papers, as the telegram stated, I then advised Judge Lake of Omaha, of this fact, and asked

111 him if [—] wanted to have the tender made over again. That is all. I also find, from reference to a copy of a telegram in my hand, that I wrote Judge Lake a letter on May 4th in relation to this matter.

Q. Will you attach a copy of said letter to your deposition and make it a part thereof?

A. I will if I can obtain a copy from the records of the bank.

Respondent Cheney offers in evidence the letter identified by the witness, and a copy of the same is hereto attached, marked exhibit 2. and made a part of this deposition.

[—] Have you a copy of the telegram you sent to Judge Lake?

A. I have, yes, sir. This is a letter press copy.

Q. When was this telegram sent?

A. It was sent on the 5th day of May, 1891.

Q. Will you allow the notary to make a copy thereof and attach it to your deposition, to be used in evidence herein?

A. Yes, sir.

Respondent offers in evidence a copy of the telegram mentioned by witness, and a copy of the same is hereto attached, marked exhibit 3. and made a part of this deposition.

Q. Did you receive an answer to that telegram to Mr. Lake?

A. Yes, sir.

Q. Have you that telegram?

A. I have.

Q. When was that received?

A. It was received, according to the memorandum on it, at the telegraph office in Lincoln, on the 5th day of May; presumably that is the time, although the date is incomplete. I do not know whether it came into my hands that day or not.

Q. Is this the telegram you received in response to your letters and telegrams in relation to this matter?

112 A. In response to my telegram, yes, sir.

Respondent Cheney offers in evidence the telegram identified by the witness, and a copy of the same is hereto attached, marked exhibit 4. and made a part of this deposition.

Q. You are willing that the notary should make a copy of this and attach it to your deposition?

A. Yes, sir.

Re-Direct Examination.

By Mr. Sabin.

Q. This visit from Mr. Cheney to the bank was made before or after the telegram to Judge Lake?

A. Afterwards.

Q. You stated in your cross-examination that this tender was made on behalf of Mr. Wisherd. Were you aware at that time whether it was made for Mr. Bilby or Mr. Wisherd,

any further than that it was to pay off the Wisherd indebtedness to Cheney?

A. That was all I knew about it. Mr. Wisherd had been here and said the money would be sent and it was sent by Mr. Bilby and we made the tender to pay off the Wisherd indebtedness to Cheney. I knew nothing about their relations to each other.

Q. Were you going to make the tender again at Tecumseh, on the date mentioned, if Judge Lake had said to do so?

Respondent Cheney objects to the question as incompetent, irrelevant and immaterial.

A. Yes, if Judge Lake had requested it to be made over again, we should have done so.

Q. Who was it who paid you the expenses for making that tender, Mr. MacFarland?

A. Mr. John A. Wisherd paid all the expenses.

Q. Well, do you know how it was paid?

113 A. No, I do not remember how.

Q. Was it a draft on Mr. Bilby for that amount?

A. I could not say as to that.

Q. You have really no recollection now of how that was done?

A. No, I have not, except that Mr. Wisherd was here and he had failed to pay the cost of making it in the year before, and while he was here he in some manner paid the cost of that as well as this other. That is my recollection.

Q. You don't remember whether it was a draft on Mr. Bilby or how it was done.

A. No, I do not remember that.

Re-Cross-Examination.

By Mr. Magoon.

Q. What was done with the money that Mr. Callihan took to Tecumseh, in May, 1891, to make the alleged tender, on his return from Tecumseh with it?

A. Well, I don't recollect now, how much of it he brought back, but what he did, was put into the general cash of the bank—what ever he brought back.

Q. It was taken from that fund, and put back in that fund?

A. Yes, sir.

Q. And used as the moneys of the bank from that time on?

A. Yes, sir.

Q. Was any tender made to Mr. Cheney when he was in the bank during his call in May, 1891?

A. No, sir, there was no tender made.

Re-Direct Examination.

By Mr. Sabin.

Q. He did not indicate that he wanted any money, did he?

A. He didn't seem very anxious for it.

114 Q. Did he say whether it was too little or too much?

A. I don't think the question of the amount was discussed at all.

Re-Cross-Examination.

By Mr. Magoon.

Q. If during the term you were president of the First National Bank in the year, 1892, the Wisherd notes had be- - presented at this bank for payment, would you have allowed said bank to pay the said notes, without additional arrangements being made by Mr. Bilby and Mr. Wisherd additional to what was in the bank at that time?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. I would not in 1892.

Q. After what time in the year 1891, would the bank have refused to pay these notes upon the strength of the arrangements made, up to and including the time of receiving, by the bank, of the draft sent by Mr. Bilby for $19,512.00?

A. We would not have paid out the money after the injunction was served on us, which, as I remember, was about the 7th day of May. And in the absence of that injunction would not have paid it out after the time when Mr. Cheney was here personally, because the draft would then have been returned to Mr. Bilby, had we not been enjoined from doing so.

Re-Direct Examination.

By Mr. Sabin.

Q. You may state, Mr. MacFarland, after Mr. Cheney refused to take the money, whether you then thought the office of the draft had been fulfilled?

Respondent Cheney objects to the question as incompetent, irrelevant and immaterial and as presuming a fact not shown to exist.

A. That is rather a difficult question to answer. I considered that the tender of the money for which the draft was sent us had not been accepted, and that the draft therefore would have been returned as stated, to Mr. Bilby, in the

115 absence of our being enjoined.

Q. Do you remember who the attorneys were, who appeared in that injunction proceeding on the part of the plaintiff?

A. Yes, sir, I think Mr. Hazlett of Beatrice, and Mr. Magoon, here present, appeared in that case.

Q. You say Mr. Magoon, who is present in this?

A. Yes, sir.

J. D. MACFARLAND.

EXHIBIT A.

E. H.

Copy. No. 4276.

C. A. Holmes, President. Chas. McCrosky, Vice-President.
C. D. Bennett, Cashier.
Tecumseh National Bank.
(Successor to Bank of Russell & Holmes.)
Tecumseh, Neb. May 2d, 1891.

O. Callihan, Esq.
Cashier.

Dear Sir: We decline to accept the tender this day made by you of $19,512.00 for J. A. Wisherd to pay certain notes given to P. D. Cheney, under contract for sale of lands for the reason that we are not authorized by P. D. Cheney to accept the money, nor have we the notes in our possession, nor the deed to the premises for which notes are claimed to have been given.

Respectfully,
RUSSELL & HOLMES,
By C. A. HOLMES.

116 EXHIBIT B.

Copy E. H.

The Western [Untion] Telegraph Company.
5-17 P. M.
5-5-1891.
Dated Tecumseh, Nebr.

To J. D. Macfarland.

Cheney says he will see you to-morrow about Wisherd matter.

C. A. HOLMES.

EXHIBIT 3.

Copy E. H.

Lincoln, May 5 1.

Hon. Geo. B. Lake,
Omaha.

See my letter yesterday. Cheney is now at Tecumseh. Wisherd note was due second. This is last day of grace. Do you advise making tender again?

Paid. J. D. MACFALAND.

EXHIBIT 4.

Copy E. H.

The Western [Untion] Telegraph Company.

5 40 P. M.

5/5 189.

Dated Omaha, Neb. 5.

J. D. Macfarland.

To your question my answer is no.

GEO. B. LAKE.

MEMORANDUM IN LIEU OF EXHIBIT 1.

I fail to find a copy of a letter from myself or Mr. Callihan to John A. Wisherd, containing the statements testified to by me on page 35, the probabilities are therefor- that these statements were made to Wisherd verbally, when he came here in response to Mr. Callihan's letter of March 9th 1891. A
117 copy of which so far as it can be made is hereto attached. A portion of this letter failed to copy in the letter press book.

J. D. MACFARLAND.

1798.

First National Bank of Lincoln.

(Copy.) Lincoln, Neb. March 9th, '91.

John A. Wisherd,
Clarkson, Nebraska.

Dear Sir: Your note for 112.00 given this bank for the use of $17,000.00 and service rendered in making a tender in the case of the Cheney note, has been past due since the 1st day of September, 1890. The date when you desire to make a tender to the same parties again will soon be here and unless you pay this note, we will certainly refuse to entertain a proposition to accommodate you again.

It would be well for you to give the matter of making this tender attention in time, as we will require better security than we had last year until after the date when the note matured had passed is the reason for the suggestion and not that this bank has any interest in the contest between you and Mr. Cheney.

Very truly yours,

Copy. OSCAR CALLIHAN, Cas.

EX. 2.

Copy. Lincoln, Neb. May 4th, 1891.

Hon. Geo. B. Lake,
Omaha, Neb.

Dear Sir: Mr. John A. Wisherd, whose attorney you are in his case against P. D. Cheney, of Jerseyville, Ill. arranged

with us to make a tender at the banking house of
118 Russell & Holmes, Tecumseh, Neb. of the payment due to said Cheney under a contract for sale of land, and also desired us to advise you of the result of that tender, and in accordance with his request, I write to say that the tender was not accepted, and for your information I enclose herewith a copy of a letter from Messrs. Russell & Holmes, declining to accept the tender and giving their reason therefor.

Yours truly,

Copy. J. D. MACFARLAND, Pr.

P. S. Chapman, being by me first duly examined, cautioned and solemnly sworn, and being of lawful age, upon his oath testified as follows:

Examined by Mr. Sabin.

Q. State your name?
P. S. Chapman.
Q. Age?
27.
Q. Place of residence?
Lincoln, Nebraska.
[—] And occupation?
Book-keeper.
Q. What connection did you have with the First National Bank on May 5th, 1888?
I was in their employ as clerk and accountant.
Q. Mr. Muit was the cashier at that time? D. D. Muir?
Yes, sir.
Q. Of your bank?
Of the First National Bank.
Q. Now you may state what you did on that day for the First National Bank, and at their request?
I went to Tecumseh, in Johnson County, to the banking house of Russell & Holmes and tendered to them $2339.50.
119 Q. What did you make that tender for?
To pay two notes—I believe there were two notes—of John A. Wisherd to P. D. Cheney.
Q. Have you a memorandum of the amount of the notes?
Only as here is a letter from Mr. Holmes acknowledging the tender of it made to Russell & Holmes. I don't know who did sign the letter, I think it is his writing though. A letter from the banking house of Russell & Holmes is the only memorandum.
Q. What did you receive at that date, if anything, from Russell & Holmes acknowledging this tender?
Nothing except a statement from Mr. Holmes that he would acknowledge it to Mr. Muir in a letter as being done, in behalf

of the bank. He made the statement to me, and said he would write the letter to Mr. Muir.

Q. Have you the letter he wrote to Mr. Muir, that day?

Yes, sir.

Q. Is that the letter you have in your hand?

That is the one I suppose he wrote at that time. I did not see him write it, but it bears that date.

Q. Is that letter a part of the bank's papers?

I should regard it as such, it is addressed to Mr. Muir as assistant cashier. It appears I was wrong in stating that Mr. Muir was cashier, he was assistant cashier before he became cashier, and I don't remember definitely the time he became cashier. I worked under him in both capacities.

Q. In what kind of money did you make that tender?

Principally gold, possibly $4.56 was in silver, and may be the whole $9.60. The larger part of it was gold.

Q. You may state whether the money was counted there?

The money was counted there in my presence, yes, sir.

120 Q. By whom?

Mr. Holmes. Well, we piled it up together practically.

Q. Charles A. Holmes?

I believe that was his name. He was at that time acting for the firm of Russell & Holmes. There are two Holmes' and I don't know which one I met at the bank.

It is admitted by the complainant and by respondent Cheney that exhibit J attached to the deposition of Mr. Lippincott is in the handwriting of C. A. Holmes, and the same is herewith referred to.

Q. What time in the day did you make this tender?

It was shortly after the bank opened in the morning. I should judge, as early as I can remember, 10 o'clock.

Q. How long did you leave the money there in the bank?

I gave them instructions to return the money to the First National Bank by express if it was not called for during the day in payment of the notes.

Q. You left the money there in the bank?

Yes, sir.

Q. During that day?

Yes, sir.

Q. Did you make any inquiry about the notes that you were making the tender to pay off?

I didn't make any special inquiry. He stated that the notes were not there.

Q. Who said that?

The gentleman that I transacted the business with.

Q. Did you have anything to do with making the tender there in 1889, at Russell & Holmes Bank in Tecumseh?

Yes, sir.

Q. You may state what you did at that time?

I went to the banking house of Russell & Holmes, Tecumseh, Nebraska, and made a tender of $2226.36 to pay two
121 notes given by John A. Wisherd to P. D. Cheney, one for $1886.73, and one for $339.63.

Q. Did you make any memorandum at that time of what you did?

Upon my return to the First National Bank, Lincoln, I made a written memorandum of it.

Q. You may state whether you made any tender on the following 6th day of May, and if so, why?

Yes, sir, I made a similar tender of the same amount, for the same purpose, at the same place.

Q. What kind of money was it in?

Principally gold.

Q. Well, you may state if you know, whether it was legal tender. That is, it was the same money, wasn't it? I mean on the 6th, the same as on the 4th. Was it legal tender?

I regard it as such, and Mr. Holmes accepted it as such.

Q. Well, what did he say about the notes at that time?

He made the statement that they were not there.

Q. Have you the memorandum that you made at that time, in your hands?

Yes, sir.

Complainant offers in evidence the memorandum to which the witness has referred in his testimony, and a copy of the same is attached to this deposition and made a part hereof, marked exhibit A.

Respondent Cheney objects to the introduction of this exhibit as incompetent, irrelevant and immaterial.

Q. You may state, Mr. Chapman, how long you stayed there?

Well, I was there from sometime on Saturday, until, I think it was Monday afternoon.

Q. Where did you get the money to go there with?

The funds were sent by express.

Q. From where?

From the First National Bank of Lincoln.

122 Cross-Examination.

By Mr. Magoon.

Q. What was done with this money after you got through with it down there at Tecumseh. Was it brought back to the First National Bank at Lincoln here and put into its general funds?

I believe it was shipped back here.

Q. By whom?

Russell & Holmes.

Q. When?

My belief is it was done the following day after we were through with it there.

Q. What did the First National Bank do with it after they got hold of it? Put it into their funds?

I suppose they did, I didn't see it after it came back.

P. S. CHAPMAN.

The further taking of these depositions was hereupon adjourned until between the hours of 9 and 12 Tuesday, December 11th, 1894.

E. J. HEDGES,
Notary Public.

EXHIBIT A.

E. H.

Copy. 1798.

John Fitzgerald, President. John R. Clark, Cashier.
D. D. Muir, Ass't. Cashier.
The First National Bank.

Lincoln, Neb. May 4, 1889.

I this day tendered Russell & Holmes, Bankers at Tecumseh, Nebraska, Twenty-two hundred Twenty-six & 36/100 dollars, $2226.36, to pay two notes, given by Jno. A. Wisherd to P. D. Cheney, one for Eighteen hundred Eighty-six & 73/100 dollars ($1886.73) and one for Three hundred Thirty-nine & 123 63/100 dollars ($339.63).

P. S. CHAPMAN.

May 6, 1889. I this day made the above described tender to pay the above described notes.

P. S. CHAPMAN.

Richard D. Miller, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as herein after certified, deposes and says as follows, viz:

Examined by Mr. Sabin.

Q. State your name, age, place of residence and occupation.

Richard D. Miller, 26 years old, Lincoln, Nebraska, Treasurer of the Lincoln Savings Bank & Safe Deposit Company.

Q. Mr. Miller, you may state what connection you had with the First National Bank of Lincoln, prior to this present time, and when you were here?

I was book-keeper from 1882 to 1884, assistant teller from 1884 to 1885. paying teller from 1885 to 1891, and assistant cashier from that time to November, 1892.

[—] Mr. Miller, did you have anything to do with certain tenders of money to pay certain notes given by John A. Wisherd to Prentiss D. Cheney during the time that you were in the First National Bank?

Yes, sir. I made some tenders. I made four tenders, as shown by the statements.

Q. I have only three here.

One was made twice, on Saturday and Monday, I think.

Q. You may state under whose guidance and instructions you made them?

Mr. Muir's.

Q. What position did he occupy then?

He was assistant cashier part of the time, and cashier part of the time. I don't remember when the change was made.

124 Q. Of the First National Bank of Lincoln?

Yes, sir.

Q. You may state what you did towards making a tender in 1887?

May 5th, 1887, I tendered to O. P. Mason, $2452.70 to pay two notes given to P. D. Cheney by John A. Wisherd, one for 1886.73 and one for $566.03, due May 2 and 5, 1887.

Q. Now in making that tender what did you do?

I presented the money to Mr. O. P. Mason and stated the notes I was to pay.

Q. In what shape was the money?

It was $2452.50 in gold, and 26 cents in silver and coppers.

Q. What did Mr. Mason say to you at that time?

Respondent Cheney objects to the question as incompetent, irrelevant and immaterial.

Q. Well, you may state, before you answer that, whether he claimed to be the attorney of Mr. Cheney at that time?

Respondent Cheney objects to the question as leading, incompetent irrelevant and immaterial.

That I do not know. I was merely instructed to tender it to him.

Q. Well, state what he said when you made the tender?

Respondent Cheney objects to the question as incompetent, irrelevant and immaterial.

He refused to accept it.

Q. What did he give as a reason?

Respondent Cheney objects as incompetent, irrelevant and immaterial.

He gave no reason.

Q. State whether or not he counted the money?
He did not.
Q. Now, you may state what you did in 1888?
May 5-1888, I tendered C. E. Magoon—
Q. I will ask you if you kept a memorandum of your tender of 1887, to Mr. Mason?
125 Yes, sir.
Q. Have you that now?
Yes, sir.
Q. When was that memorandum made?
The same day the tender was made.
Q. Will you permit the notary to take a copy of this memorandum and attach it to your deposition?
Yes, sir.

Complainant offers in evidence the memorandum, testified to by witness, and a copy of the same is hereto attached, marked exhibit A, and made a part of this deposition.

Respondent Cheney objects to the introduction of this exhibit as incompetent, irrelevant and immaterial.

Q. You may state what you did in 1888, if anything, towards making a tender to Mr. Cheney, or any of his attorneys?
May 5, 1888, I tendered to C. E. Magoon, at the office of Mason & Whedon, in this city, $2339.56, to pay two notes given P. D. Cheney by John A. Wisherd, one for $1886.73, due May 2, 1888, and one for $452.83, due May 5, 1888.
Q. Where was that tender made?
At the office of Mason & Whedon, Lincoln, Nebraska.
Q. C. E. Magoon. Is that the gentleman who is now sitting here?
Yes, sir.
Q. In what kind of money was that tender made?
$2337.50 of the amount was in gold. There were two one dollar United States Treasury notes and a nickle and a cent.
Q. You may state whether you carried the currency down to the office of Mr. Magoon?
Yes, sir. I carried this money down.
Q. After you got down there, what occurred?
126 I tendered him the money, as stated, he counted it and handed it back and refused to accept it?
Q. In what words were his refusal, if you remember?
I don't remember the exact words. He simply refused to accept it.
Q. He was very careful to count the money, was he?
He counted the money.

Q. You may state, Mr. Miller, whether you kept a record of the tender at that time?

I did.

Q. Have you that memorandum now?

I have.

Q. When was that record made?

At the same time the tender was made.

Q. Will you permit the notary to take a copy of this memorandum and attach it to your deposition?

Yes, sir.

Complainant offers in evidence the memorandum identified by witness, and a copy of the same is hereto attached, marked exhibit B, and made a part of this deposition.

Respondent Cheney objects to the introduction of this exhibit as incompetent, irrelevant and immaterial.

Q. You may state at whose direction you made this tender in 1888?

Mr. Muir's.

Q. He was cashier at that time?

I think he was cashier at that time. Cashier or assistant cashier.

Q. You may state whether you made a tender in 1889?

May 4, 1889. Yes, sir.

Q. You may state to whom that was made?

It was made to Mr. O. P. Mason.

Q. At what place?

127 At his office, in Lincoln—at the office of Mason & Whedon, in Lincoln.

Q. You may state what you did towards making that tender?

May 4, 1889, I tendered to O. P. Mason $2226.36, to pay two notes given by John A. Wisherd to Prentiss D. Cheney, due May 2 and 5, 1889. One for $1886.73 and one for $339.63.

Q. You may state what Mr. Mason said and did in relation to it?

He refused to accept the money.

Q. You may state whether or not he counted it?

He did not.

Q. You may state whether or not you made another tender?

On May 6, 1889, I tendered to O. P. Mason $2226.36, to pay two notes given by John A. Wisherd to P. D. Cheney, due May 2 and 5, 1889, one for $1886.73 and one for $339.63.

Q. In what way was that tender made? That is, in what kind of currency?

$2225. in gold, one United States Treasury note of $1.00, 35 cents in silver and one cent.

[—] You may state, Mr. Miller, whether you kept a record of these tenders made at the time—have you a minute of it?

Yes, sir.

Q. You may state whether you have that now?

I have.

Q. Please produce it to the notary.

I will.

Complainant offers in evidence the memorandum testified to by witness, and a copy of the same is hereto attached, marked exhibit C. and made a part of this deposition.

Respondent Cheney objects to the introduction of this exhibit as incompetent, irrelevant and immaterial.

Q. These were the only tenders that you personally made, were they Mr. Miller?

128 Yes, sir.

Q. You may state what you know, if anything, about Mason & Whedon being the attorneys of Mr. Cheney, at that time, in this particular matter?

I know nothing in regard to that.

Q. You may state where Mr. Magoon kept his office, at that time?

With Mason & Whedon.

Q. I will ask you, Mr. Miller, if you remember of Mr. Whedon coming to the First National Bank of Lincoln, sometime during the year, 1886, and calling for certain moneys or notes that were left here in this bank for Mr. Cheney by Mr. Wisherd?

No, sir. I know nothing about it.

Q. Mr. Miller, did you have anything to do about certain tenders of money that were left here to be made to Mr. Cheney by Mr. Wisherd, during the year, 1885, and from that time until, perhaps 1887?

From May 17, 1885, to May 4, 1886, we had $5785.00 in gold.

Q. How was that money kept?

It was carried in the cash of the bank.

Q. What I want to know is, was it kept by itself?

It was kept in a separate sack with a tag attached.

Q. (Showing witness exhibits A and B, copies of which are attached to Mr. Lippincott's deposition.) I will ask you if that is the tag?

Yes, sir.

Q. You say it was kept in that way until May, 1886?

Yes, sir. Then from May 4, 1886, to December 22, 1886, there was $8351.00, carried in that way in two separate sacks,

one containing $5785.00 and one containing $2566.00. Then from December 22, 1886, to January 30, 1887, there was $5785.00 carried.

Q. Do you remember whether that was kept in that original package up to that time, from 1885?

Yes, sir, it was.

129 Q. Up until January, 1887?

Up to January 30th.

Q. Do you know what arrangements were made at or about that time, that is, January 30th, 1887, whereby that was not kept in the original package?

Yes, sir, at this time Mr. Muir informed me that an arrangement had been made by Mr. Wisherd, by which Mr. Wisherd was to pay the bank $100.00 a year for the purpose of keeping these tenders good.

Respondent Cheney moves to strike out the answer to this question for the reason that the same is hearsay, and is incompetent, irrelevant and immaterial.

Q. Do you know, Mr. Miller, anything about that $100.00 being paid after that time?

No, I do not. I do not remember. The books of the bank would show that.

Q. You may state whether you remember of any of them being paid?

No, sir. I do not remember. The business was never transacted with me. It was transacted with either Mr. Muir or Mr. Clark, so far as the arrangements with Mr. Wisherd were concerned.

Q. Mr. Muir, at the time he told you this in 1887, was cashier?

He was cashier at that time.

Q. What time did you sever your connection with the bank, Mr. Miller?

October or November, 1892, I don't remember the exact date.

Q. Do you remember of any other transactions connected with the business, except what you have stated?

No, sir, I do not.

Cross-Examination.

By Mr. Magoon.

Q. Mr. Miller, you had the supervision of the cash book from 1885, to 1887, did you not, inclusive of both years?

Yes, sir.

130 Q. Now you say there was held by the bank $5755.00 from the 4th day of May, 1885, to the 17th day of May, 1885, at which time it was increased to $5785.00?

Yes, sir.

Q. Do you know the reason of the increase on May 17th?
No, sir.
Q. This money was afterwards, on May 4, 1886, increased by the addition of $2566.00. Is that correct?
Yes, sir.
Q. That is correct?
That is correct.
Q. And that sum was carried until December, 22, 1-?
Yes, sir, 1886.
Q. Now, how was that carried by the bank?
It was carried in a separate sack along with the other gold of the bank, the cash of the bank.
Q. How did it appear on the books of the bank?

Complainant objects to the question as incompetent.

It appeared as that much cash on the cash book.
Q. It appeared as a cash item.
Technically a cash item is not cash. It just represents cash.
Q. Did it appear or did the bank carry it, as a special deposit?
No, I would rather say they carried it as a trust fund. It was set aside for a particular purpose.
Q. Did it not appear as a part of the gold reserve of said bank?
It did.
Q. And was considered by the bank as a part of its gold reserve?
So counted, yes, sir.
Q. And was so reported to the bank examiner, was it not?

Complainant objects to the question unless the witness knows.

Yes. sir, it was.
131 Q. Would you deal with the bank examiner, when he was here?
Yes, sir.
Q. And did you account to him for this money as part of the gold reserve of the First National Bank of Lincoln?
Yes, sir.
Q. Now, it was at all these times, from May 11, 1885, to December 22, held and carried in the manner, which you have stated?
Yes, sir.
Q. Now, on December 22nd, you testified that the sum of $8351.00 was reduced to $5785.00?
Yes, sir.

Q. Do you know the reason of that reduction?

I do not.

Q. Then this $5785.00 was carried from December 22, 1886, to January 30th, 1887, was it, and was it carried in the same way as it had been heretofore, appearing on the books as cash and held as part of the gold reserve of the First National Bank of Lincoln?

Yes, sir.

Q. On January 30th, what was done with this money?

It was counted into the cash—taken out of the sack and counted into the balance of the cash.

Q. It was mingled with the general funds of the bank at that time?

Yes, sir.

Q. Let me refresh your memory as to the time. Did not this take place on January 29, on Saturday, and was not the 30th Sunday?

I have no recollection of that.

Q. It was about that time?

I do not think the 30th was on Sunday. I think our cash was made up on that day.

Q. It then became mingled with the general funds of the bank and was not set aside for any purpose?

132 No, sir.

Q. Since that time, has there ever been any setting aside, or laying out or particular designation of any funds of the bank for the purpose of keeping these tenders good?

Not in the manner of these.

Q. There has simply been funds in the bank. That is, what I mean is, the bank has had money at all times to pay all claims that might be lawfully and legally made against it?

Yes, sir.

Q. The bank has been able to meet its obligations at all times, this among others?

Yes, sir.

Q. But there has been no setting aside, designating, of any particular fund with which to pay any special claim Mr. Cheney might have against Mr. Wisherd or Mr. Bilby, to your knowledge?

No, sir.

RICHARD D. MILLER.

EXHIBIT A.

E. H.

Copy.

I tendered on May 5, 1887, to O. P. Mason, Twenty-four hundred fifty-two dollars seventy-six cents, ($2452.76) to pay two

notes given P. D. Cheney by Jno. A. Wisherd, one for Eighteen hundred eighty-six dollars, seventy-three cents, (1886.73), and one for Five hundred sixty-six dollars, three cents, ($566.-03), due May 2nd and 5th, 1887.

R. D. MILLER.

EXHIBIT B.

E. H.

Copy.

May 5th, 1888, I tendered C. E. Magoon, at the office of Mason & Whedon, this city, twenty-three hundred thirty-nine dollars fifty-six cents ($2339.56), to pay notes given P. D. Cheney by Jno. A. Wisherd, one for Eighteen hundred eighty-six dollars seventy-three cents, ($1886.73), due May 2,
133 1888, and one for four hundred fifty-two dollars eighty-three cents, ($452.83), due May 5th, 1888.

R. D. MILLER.

EXHIBIT C.

E. H.

Copy.

May 4, 1889. I this day tendered O. P. Mason, Twenty-two hundred Twenty-six dollars thirty-six cents, ($2226.36), to pay two notes given by Jno. A. Wisherd to P. D. Cheney, due May 2/5, 1889. One for Eighteen hundred eighty-six dollars seventy-three cents, (1886.73), & one for Three hundred thirty-nine dollars sixty-three cents, ($339.63)

R. D. MILLER.

May 6, 1889. I this day made the above tender to pay the above described notes.

R. D. MILLER.

State of Nebraska,
Lancaster County—ss.

I, E. J. Hedges, a notary public, duly commissioned and qualified, do hereby certify that Charles S. Lippincott, John D. Macfarland, P. S. Chapman and Richard D. Miller, were by me first severally duly sworn to testify the truth, the whole truth and nothing but the truth, and that the depositions by them respectively described as above set forth, were reduced to writing by me and in the presence of the witnesses respectively, and were respectively subscribed by the said witnesses in my presence and were taken at the time and place in the annexed notice specified, that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit; and said depositions were commenced at the time in said notice specified, and were continued from day to day until the same were completed, and that it was agreed by the par-

ties that copies of the exhibits should be attached to these depositions and the originals be produced at the trial.

134 In testimony whereof, I have hereunto set my hand and official seal, at Lincoln, Nebraska, this 30 day of December, 1894.

[Seal] E. J. HEDGES,
Notary Public.

My commission expires March 28, 1899.

Costs.

Swearing four witnesses	.40
174 hundred words, at 20c	34.80
Two certificates	.50
Postage	.15
Fees of C. S. Lippincott as witness	2.00
" " John D. Macfarland, as witness	2.00
" " P. S. Chapman, " "	2.00
" " Richard D. Miller, " "	2.00
Total	$43.85

Paid by complainant.

[Seal] E. J. HEDGES,
Notary Public.

My commission expires March 28, 1899.

Upon the back of said Depositions appear endorsements in the words and figures following, to-wit: No. 270 P. Rec'd & filed Jan'y 7/95 [&] opened by order of Court Jan'y. 26/95. Elmer D. Frank, Clerk.

135 Thereupon afterwards to-wit:—On the Seventh day of January, 1895, a Deposition was filed in said case, which said Deposition is in the words and figures following, to-wit:—

NOTICE TO TAKE DEPOSITIONS.

In the Circuit Court of the United States, Judicial District of Nebraska.

The State of Nebraska,
.....County—ss.

Notice to Take Depositions.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, et al., Respondents.

The Above Named respondents will take notice, that on the Seventeenth (17th.) day of December, 1894, the said complain-

ant will take the deposition of Oscar Callahan, sundry witnesses to be used as evidence on the trial of the above entitled cause at the first National Bank in the City of Lincoln, County of Lancaster and State of Nebraska, between the hours of nine (9) A. M. and six (6) P. M. of said day and the taking of said depositions will be adjourned from day to day between the same hours until they are completed.

LAKE, HAMILTON & MAXWELL, and
R. W. SABIN,
Solicitors for complainant.

Received copy of the above notice this 13th. day of December A. D. 1894.

CHAS. E. MAGOON,
Solicitor for respondent Prentiss D. Cheney.

A. HAZLETT,
Solicitor for Susan B. Alden, Executrix, Respondent.

(Indorsed on back as follows): Notice to take depositions. John S. Bilby, Complainant, vs. Prentiss D. Cheney, et al. Respondents. In Circuit Court of the United States, Judicial District of Nebraska. Lake, Hamilton & Maxwell and R. W. Sabin, solicitors for complainant.

136

The State of Nebraska,
Lancaster County—ss.

In the Circuit Court of the United States, District of Nebraska.

DEPOSITIONS.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, et al., Respondents.

Deposition of witness taken before me a Notary Public duly commissioned and qualified for and residing in the County of Lancaster and State of Nebraska, on the Seventeenth day of [Deceber] in the year 1894, between the hour of nine A. M. and six P. M. at the First National Bank in the City of Lincoln, in said County pursuant to the annexed notice to be read in evidence on behalf of the complainant in an action pending in the Circuit Court of the United States, District of Nebraska, in which John S. Bilby is complainant, and Prentiss D. Cheney, et al, are respondents.

Oscar Callihan of lawful age, being by me first duly examined, cautioned, and solemnly sworn as hereinafter certified, deposes and says as follows, viz:—

For complainant, R. W. Sabin.

Appearances:

For respondent Cheney, C. E. Magoon.

137 Questioned by Mr. Sabin:

Q. Give your name, age, place of residence and occupation?

Oscar Callihan, age 41, residence Benkleman, Nebraska, occupation Banker.

Q. Where did you live in the month of May 1887?

Tecumseh, Nebraska.

Q. State what if anything you had to do with making a tender at Russell & Holmes Bank at Tecumseh, Nebraska, on or about the fifth day of May 1887, to pay off two notes due at that time, from John A. Wisherd to P. D. Cheney?

I made such a tender.

Q. Please give the date and amount?

$2472.76, May 5th, 1887, as the date of the tender.

Q. Who did you make the tender to?

I cannot recollect the circumstance, it was made to Russell & Holmes at the bank.

Q. At their bank?

A. Yes at their bank at Tecumseh, Nebraska.

Q. Do you remember the kind of money it was made in?

I cannot remember further than the object was to make a legal tender. I knew nothing about the matter in controversy. My instructions were to make a legal tender in that amount at that time, which I did.

Q. Do you remember where the money came from with which you made the tender?

I do not.

Q. Who instructed you to make this tender?

138 It was made under instructions from and for John R. Clarke.

Q. State who he was?

The Cashier or President of the First National Bank of Lincoln.

Q. Who was it furnished the money?

I cannot say.

Q. Well you may state whether—

Well it was Mr. Clark who furnished the money of course.

Q. As far as you know?

As far as I know at that particular time the money was furnished by John R. Clark.

Q. Do you remember what Russell & Holmes said in relation to accepting the tender?

They refused to accept it.

Q. Do you remember what they said if anything in relation to the notes of Wisherd to Cheney for which the tender was made, whether they were there or not, at their bank at that time?

I do not.

Q. You may state, Mr. Callihan whether after this time you became engaged with the first National Bank of Lincoln, and if so state in what way?

I was connected with the First National Bank of Lincoln as its Cashier from January 1890, to June 1891.

Q. Do you remember about the First National Bank making a tender at the bank of Russell & Holmes in the month of May, 1890, of certain money to pay off two notes that were due that year from Wisherd to Cheney?

I do not remember the circumstance although my letters on file show very plainly to me that I made that tender, but I cannot recall the circumstance.

139 Q. You have a right to refresh your memory from minutes made at that time.

Well from minutes made at that time I would say that I made a tender on that date mentioned.

Q. State how much that was Mr. Callihan on or about May 3rd. or 5th.?

May 3rd. or 5th. On May 3rd. I wrote to Mr. Holmes to pay a certain note or notes to the amount of $2113.16 and charge to our account, that was the account of the First National Bank. Sometime afterwards during the month of May Mr. Holmes notified me that the notes of Wisherd were there at that bank and I offered to pay these notes and I went down and they were not there. I gather that from this memorandum and correspondence. Of course I have a recollection of the matter that is vague and ill defined.

Q. Mr. Callihan is it necessary for you to have that memorandum here for you to testify in relation to this matter?

Yes.

Q. Have you got that memorandum showing the transaction at that time?

Yes.

Q. Did you as Cashier of the First National Bank of Lincoln, Nebraska, receive a letter from Russell & Holmes in the month of May in regard to certain notes of Mr. Wisherd to Mr. Cheney that had been sent there for payment?

Respondent Cheney objects to the question as incompetent, irrelevant and immaterial.

Yes, sir.

Q. Have you the letter with you that you received from Mr. Holmes?

140 Yes.

Q. Is this the letter you received from Mr. Holmes?

Yes.

Q. Of what date?

May 19th, 1890.

Complainant offers in evidence the letter identified by the witness and a copy of the same is hereto attached marked Exhibit A. and made a part of this deposition. The parties agreeing to produce the original on the hearing of this case.

Respondent Cheney objects to the introduction of this Exhibit as incompetent, irrelevant and immaterial.

Q. Now what did you do after you got that letter Mr. Callihan?

This correspondence indicates that I went down there and made a tender, and I believe that I did. The incidence connected with it I do not [known] from my memory.

Q. You were Cashier of the bank at that time?

Yes sir, I was Cashier of the bank at that time.

Q. After refreshing your memory from the minutes that you made at that time what do you say at to going to Tecumseh, to the bank of Russell & Holmes and making a tender?

I would say I made the tender.

Q. On what date?

May 29th. 1890.

Q. How much did you tender to them at that time?

$17,505.00.

141 Q. For what purpose?

For the payment of the Wisherd-Cheney notes.

Q. Mentioned in—

Mentioned in the letter of Mr. Holmes of the 19th. complainant's Exhibit A.

Q. That is the notes mentioned in that letter of Mr. Holmes?

Yes, sir.

Q. What was the result of your tender there Mr. Callihan?

Acceptance was refused.

Q. Do you remember whether the money was counted over there or not at the bank?

I do not recall counting it, I presume I would in making a legal tender count the money.

Q. Do you remember whether Mr. Holmes counted it or not?

I would also in a matter of that kind have the other party count the money. The act of counting the money either by him or by myself I cannot recollect but knowing it was essential and that the question would be asked as to the amount of money I would naturally have all the parties interested count it.

Q. He refers here in this letter of May 19th. complainants Exhibit A. to a letter received from you on May 3rd. Have you that letter that you wrote to him or a copy of the same?

I have a copy of it.

Q. When was that made?

May the third, 1890.

142 Q. Whose handwriting is the copy in?
Mine.
Q. What do you say as to that being a correct copy of what you sent Mr. Holmes?
I would say it would be correct.
Q. Will you allow the Notary to take this letter and identify it?
Yes, sir.

Complainant offers in evidence the letter referred to by witness and a copy of the same is hereto attached marked exhibit B. and made a part of this deposition it being agreed that the copy produced by witness shall be produced at the trial of this cause.

Respondent Cheney objects to the introduction of this Exhibit as incompetent, irrelevant, immaterial.

Q. Do you remember why the tender was not accepted?
I do not.
Q. Do you remember how long the money was there?
I do not.
Q. Did you make any memorandum at that time in regard to that tender?
Yes sir, I made it as it is here. This memorandum dated May 29th.
Q. Will you permit the Notary to identify this?
Yes, sir
Q. When did you make this Mr. Callihan?
May 29th. 1890.

143 Complainant offers in evidence the paper identified by witness and the same is hereto attached marked Exhibit C. and made a part of this deposition it being agreed that the original shall be produced at the hearing of this cause.

Respondent Cheney objects to the introduction of this memorandum as incompetent, immaterial and irrelevant.

Q. Mr. Callihan did you make a tender in 1891 for the First National Bank at Tecumseh, for the payment for Mr. Cheney to pay off certain notes given by Mr. Wisherd, if so state what you did in regard to that?
I made a tender [—] $19,512.00 on May 2nd. 1891, to pay the notes described.
[—] Where did you make that tender?
At the bank of Russell & Holmes, I think the Tecumseh National Bank was probably its title at that time.
Q. In what kind of money did you make that tender as near as you can remember Mr. Callihan?

It would be legal tender, the intention being to make a legal tender. I have reason to believe that I made it in that kind of money.

Q. Do you remember whether the notes given by Mr. Wisherd to Mr. Cheney were there at that time?

I do not, I remember the money was refused, but I cannot recollect what reason was given for it.

Q. You may state Mr. Callihan where the money came from?

144 I took part of that money with me and part of it I got there. How much I cannot say I don't remember.

Q. Who furnished the money to make this tender?

The First National Bank furnished the money.

Q. Of Lincoln?

Of Lincoln.

Q. Do you remember Mr. Callihan about Russell & Holmes giving you a writing declining to accept the $19,512.00?

Yes, sir.

Q. Have you that letter now?

Yes.

Complainant offers in evidence the writing to which reference is here made and a copy of the same is hereto attached marked Exhibit D, and made a part of this deposition, it being understood that the original shall be produced at the trial of this cause.

Respondent Cheney objects to the introduction of this Exhibit as incompetent, irrelevant, immaterial. and as having already been offered.

Q. You may state if this stamp on the letter noting the date of the receipt is correct?

I presume it is I have no reason to think it is not.

Q. You may state where that letter was received?

Received by the First National Bank of Lincoln, Nebraska.

Q. Mr. Callihan, you may state whether the First National Bank of Lincoln during the time that you were Cashier

145 stood ready to pay the notes upon which tender had been made while you were Cashier of the bank?

A. The bank by its representative at the time of these tenders stood ready to pay these notes.

Q. Well you may state Mr. Callihan whether you made the tender of 1890, under the arrangements that had been made prior to that time?

Yes, sir.

Q. Do you remember what arrangements were made?

I cannot recall just what arrangement was made. My best recollection is that at the time of making this tender if

the notes were produced and the amount accepted Mr. Bilby was to pay it whatever it was until the year 1891, then before making the tender there at that time the first or second of May, Mr. Bilby sent a certified check or draft.

Q. Upon which you furnished the money?

Yes sir furnished the money and made the tender.

Q. Do you remember of Mr. Cheney coming in to the bank soon after the tender of 1891, and asking if he could get the money?

I do not remember.

Q. What do you know as to whether there had been an arrangement made prior to the time that you made this tender that these tenders should be kept good at your bank, that is that the bank should at all times be ready to pay these notes if called upon to do so, that is to the amount of the tenders that had been made?

Respondent Cheney objects to the question as incompetent, irrelevant, immaterial, leading, argumentative and based upon a condition of facts not show- to exist.

146 I do not understand that such a contract existed.

Q. Did you have any knowledge in relation to it?

Respondent Cheney objects to the question as incompetent, irrelevant, immaterial the witness having stated that he knew of no such contract.

I cannot understand that question clearly.

Q. I asked you if you had any knowledge in relation to it, whether there was or not?

If there was such a contract I do not know of its existence. I might say here that a contract was made provided that the First National Bank should pay each year or offer to pay, should make this tender. But if any contract existed to hold that tender good all the year around I have forgotten it if I ever knew of its existence.

Cross-Examination.

By Mr. Magoon:

Q. With reference to the alleged tender of the year 1887, where did you get the money with which this tender was alleged to have been made?

A. It was furnished by John R. Clark as near as I can remember.

Q. In what way did he send the money to you, or did you by using the credit of John R. Clark the First National Bank or yourself secure the money from one of the banks in Tecumseh?

I cannot answer that question.

Q. Referring to your letter of that date, offered in evidence as respondents Exhibit 2, attached to the deposition of Mr. Lippincott, I will ask you to read said letter, and state if you wrote the letter?

147 I wrote that letter.

Q. And that is your signature attached thereto?

Yes.

Q. Can you by refreshing your recollection from that letter tell whether the money was sent to you from Lincoln, or whether you secured it in Tecumseh or elsewhere besides Lincoln?

I cannot tell how it was obtained but it did not come from Lincoln.

Q. You say it did not come from Lincoln?

No that letter would not indicate that it came from Lincoln. It would indicate it did not come from Lincoln, but how I obtained it I could not say.

Q. What did you do with this money after you made this alleged tender?

I cannot recollect the circumstances.

Q. Did you not return it to the person or source from whence you derived it?

Yes, as stated in the letter

Q. And it was returned to the First National Bank of Lincoln, Nebraska?

No, sir.

Q. Now I understood you to testify that you were Cashier of the First National Bank of Lincoln, Nebraska, from January 1890, to June 1891?

Yes, sir.

Q. During that time was there any money on deposit or held in trust or as a special deposit by the First National Bank of Lincoln, with which to pay any notes give- by John A. Wisherd to P. D. Cheney?

Not as a deposit. There was no money on deposit for that purpose other than in this way. We had authority by

148 letter to draw on Mr. Bilby for the amount necessary to pay these notes or make these tenders.

Q. That authority was to be exercised in the event the alleged tender was accepted was it not?

Yes, sir.

Q. And until the acceptance of the money alleged to have been tendered you had no authority to make a draft or draw these funds of Mr. Bilby?

No we had not.

Q. Was there any money deposited during the period mentioned in the First National Bank of Lincoln, with which to keep these tenders or any tender good, either as a special de-

posit or in the general account or as a trust fund for or on behalf of John A. Wisherd or John S. Bilby?

No, sir.

Q. You have stated that at that time these alleged tenders were made the bank was ready to pay the money, for how long after these alleged tenders were made did the bank stand ready to pay the money?

I think that after the tender was made and refused, if a notice had been sent of its refusal to Mr. Bilby and Mr. Wisherd, that we would not have been warranted in paying it without communicating with them if the notes were presented afterwards.

Q. If notice of declining to accept the tender had been sent, the money would not have been paid except upon further instructions from Mr. Wisherd and Mr. Bilby?

149 As cashier of the bank I would not have done it without referring to the President and deciding what to do.

Q. The method by which these tenders would be made Mr. Callihan, was as follows, was it not; You had an arrangement, or the bank had an arrangement with Mr. Wisherd, whereby you were to use this money in amounts as he indicated would be necessary to make the tenders. And these tenders would take about three days to make, including the time necessary to go to the City of Tecumseh and return, and he paid for the use of that money for three days, and if it took longer than that he was to pay you more. Was not that the fact?

I cannot say as to that. The contract was he was to pay $100. a year and expenses; that is my recollection of the matter.

Q. This money would be taken from the general funds of the bank would it not?

Yes, sir.

Q. And upon the alleged tender being refused it would be returned to the general fund of the bank, would it not?

Yes, sir.

Q. And would, when converted back into the fund of the bank, be used the same as any other of the common money and funds of the bank?

Yes.

Q. Then it simply was this; Mr. Wisherd would borrow the money from the bank for the length of time necessary to make the tender and return it to the bank after the tender was refused?

Complainant objects to the question as incompetent,
150 and irrelevant, and as assuming certain facts to exist that have not been proved, and also as not proper cross examination.

A. That would be the nature of the transaction. It would simply be a three day loan to Mr. Wisherd, with a guarantee from Mr. Bilby to pay it back at the end of three days if Mr. Wisherd did not pay it. As near as I can get at it that would be the nature of the transaction, except as to the year 1891. Then a certified draft or check was sent to us, which we could have sent in and collected before we made the tender, if we desired, but we did not do that. The check is here today.

Q. And that is the only way in which you have ever received any funds from either John A. Wisherd or John S. Bilby in this matter, is it not, and the only time that you have received anything like funds for this purpose?

Complainant objects to the question unless it is confined to 1890 or 1891.

A. Yes sir. Well, from 1890 to June 1891.

Q. Did the bank ever cash said draft or certified check to which you have referred, or receive any funds thereon?

No.

Q. It was held by the bank as collateral?

Yes. In the event of the acceptance of that tender it would have been sent in for collection.

Q. Did Mr. Wisherd default in the payment of this $100. at any time?

Complainant objects to the question as incompetent,
151 irrelevant and immaterial.

I cannot answer that, I do not know.

Q. As the time approached for the alleged tenders to be made, being from the first to the fifth of May, 1891, was the bank at that time willing to make the tender, even under the existing arrangements?

I cannot say as to the years prior to 1890.

Q. I am speaking of 1891.

Not without some guarantee from some more reliable source than we considered Mr. Wisherd.

Q. It was necessary to make a further and different arrangement from any at that time existing?

That was my understanding of the matter.

Q. Did you make such requirement of Mr. Wisherd?

Yes, sir.

Q. And was it in response to such additional and further requirement that the draft which you have referred to was forwarded to you?

It was.

Q. At that time then, the bank was unwilling to advance any money in this matter upon the arrangement which then existed?

Yes.

Q. And had the notes, contract and deed, been presented to the bank at that time, the money would not have been advanced?

Not by me as cashier of the bank.

Q. Nor with your authority?

Nor with my authority.

152 Re-Direct Examination.

By Mr. Sabin:

Complainant offers in evidence the letter dated May 6, 1887, from Oscar Callihan to John R. Clark, and the same is hereto attached, marked Exhibit E and made a part of this deposition.

Q. Mr. Callihan, you may state whether this letter, complainant's exhibit E, sets forth a true statement of what you did in regard to that tender of 1887?

It does.

Q. And when was it written?

May 6, 1887.

Q. At the time it bears date?

Yes, sir.

Q. Can you tell by looking that over where you did get the money Mr. Callihan?

No, I cannot tell where I got the money.

Re-Cross Examination.

By Mr. Magoon:

Referring to the year 1891, was there any other or different tender made, to your knowledge, excepting that alleged to have been made on the 29th. day of May?

I have no knowledge of any other tender [have] been made that year.

Re-Direct Examination.

By Mr. Sabin:

153 Q. Referring to complainant's exhibit D, this letter that you wrote to Mr. Holmes, you may state whether on that date the money would have been paid if the notes had been presented?

Respondent Cheney objects to the question as incompetent, irrelevant and immaterial, suppositious, and based upon a letter not binding upon the respondent.

I have reason to believe that it would have been done.

Q. You may state whether you had any arrangement made with Mr. Holmes to furnish the money to pay the notes, provided they were there?

Respondent Cheney objects to the question as incompetent, irrelevant and immaterial not binding upon the respondent and benefitting the complainant not at all.

I cannot remember.

Q. You may state whether or not the First National Bank of Lincoln, Nebraska, at the time of writing this letter, May 3rd. 1890, were doing business with the bank with which Mr. Holmes was connected, at Tecumseh, Nebraska?

It was.

OSCAR CALLIHAN.

154 Copy.

C. A. Holmes, President. Chas. McCrosky, Vice President. W. H. Holmes, Cashier.

No. 4276.

Tecumseh National Bank.

Successors to bank of Russell & Holmes.

Tecumseh, Neb., May 19th. 1890.

Oscar Callihan, Esq., Cashier.

Dear Sir: In reply to your letter of May 3rd. which has just come to hand I desire to say that on the 17th. inst Mr. Cheney placed in our hands for collection 14 notes given by J. A. Wisherd to P. D. Cheney dated May 2, 1881, due respectively in 3, 4, 5, 6, 7, 8, & 9 yrs. from date with interest at 10 per cent per an. from maturity. There are 7 notes of $1886.73 each & the int. notes are $905.63, $792.43, $679.23, $566.03, $452.83, $339.63, $226.43—Total am't, $17,169.32 to which is to be added int. from maturity of each note. Our instructions are to accept payment in full if he desired to pay, but not to receive any part payment on the notes or any of them.

Yours truly,

C. A. HOLMES.

C.

Please advise Mr. Wisherd.

(Stamped) First National Bank, Lincoln, Neb. May 20, 1890, Received.

Ex. "A."

155 Copy.

Capital $200,000.
Surplus $75,000.

John R. Clark, President. Oscar Callihan, Cashier.
J. D. Macfarland, Vice-President. C. S. Lippincott, Ass't Cashier.

The First National Bank.
Lincoln, Neb., May 3—1890.

C. A. Holmes, Cas.,
Tecumseh, Neb.

Dear sir: If the notes of John A. Wisherd favor of P. D. Cheney are presented at your bank for payment please pay the principal sum of $2113.16 being amount due at that time and charge our acct.

Very respectively,
OSCAR CALLIHAN, Cas.

Ex. "B."

156 Capital $200,000.
Surplus $75,000.

John R. Clark, President. Oscar Callihan, Cashier.
J. D. Macfarland, Vice President, C. S. Lippincott, Ass't Cashier.

The First National Bank.
Tecumseh, Neb. May 29th. 1890.

I this day tendered Russell & Holmes the sum of $17512.00 in payment of the notes they hold for collection in favor of P. D. Cheney and against John A. Wisherd, and acceptance was refused.

OSCAR CALLIHAN.

Copy.

Ex. "C."

157 No. 4276.

C. A. Holmes, President. Chas. McCrosky, Vice President. G. D. Bennett, Cashier.
Tecumseh National Bank.
(Successor to bank of Russell & Holmes.)
Tecumseh, Neb., May 2d. 1891.

O. Callihan, Esq., Cashier.

Dear sir: We decline to accept the tender this day made by you of $19,512.00 for J. A. Wisherd to pay certain notes given to P. D. Cheney under contract for sale of lands for the reason that we are not authorized by P. D. Cheney to accept the money nor have we the notes in our possession nor deed to the premises for which notes are claimed to have been given.

Respectfully,
RUSSELL & HOLMES.
By, C. A. HOLMES.

Ex. "D."

E. H.

158 Oscar Callihan. A. C. Sullivan.

Office of
Callihan & Sullivan,
Dealers in
Dry Goods, Clothing, Boots & Shoes.
Tecumseh, Nebr., May 6th. 1887.

John R. Clark,
Lincoln, Neb.

Dear Sir: I went to the bank of Russell & Holmes yesterday (May 5th.) and made a tender to them of two thousand four hundred and seventy-two 76-100 ($2472.76-100) dollars in payment of the two notes described in your letter of the 4th. inst. "One for Eighteen hundred and eighty-six 73-100 ($1886.73-100) dollars and one for five hundred and fifty-six 03-100 ($556.03-100) dollars both signed by J. A. Wisherd and payable to the order of P. D. Cheney."

The notes, they said, were not in their possession. I left the money there, during the afternoon, and until today, but they were not presented. The offer was made in "legal tender" obtained as you directed, and not being needed, has been returned.

Respectfully,

OSCAR CALLIHAN.

(Stamped) First National Bank.
Lincoln, Neb.
May 7, 1887.
Received.

Copy.

Ex. "E."

159 CERTIFICATE.

State of Nebraska,
Lancaster County—ss.

I, E. J. Hedges a notary public duly commissioned and qualified, do hereby certify that Oscar Callihan was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by me and in the presence of the witness, and was subscribed by the said witness in my presence and was taken at the time and place in the annexed notice specified, that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit; and said deposition was commenced at the time in said notice specified, and that the said deposition was taken, by agree-

ment of parties, at room 55 Burr Block, in the City of Lincoln, Nebraska.

In Testimony Whereof, I have hereunto set my hand and official seal at Lincoln, Nebraska, this 17th. day of December, 1894.

[Seal]

E. J. HEDGES,
Notary Public.

My commission expires March 28, 1899.

COSTS.

	Swearing one witness	$.	.10
	Subpoena		
	Forty five hundred words.		9.00
	One certificate		.25
	Postage		.10
	Fees of Sheriff or constable		
160	Fees of Oscar Callihan as witness		2.00
	Fees of....." "		
	Fees of....." "		
	Total		$11.45

Paid by Complainant.

E. J. HEDGES, Notary Public.

[Seal]

My commission expires March 28, 1899.

Upon the back of said Deposition appear indorsements in words and figures following, to-wit:—No. 270 P. Rec'd and filed Jany. 7, 1895, and opened by order of Court Jany. 26, 1895. Elmer D. Frank, Clerk.

161 Thereupon Afterwards, on the Twenty-eight- day of January, 1895, Depositions were filed in said case, which said Depositions are in words and figures following, to-wit:

Depositions of sundry witnesses taken before me Augustus Johnston, a Notary Public within and for the County of Nodaway, in the State of Missouri on the 17th. day of January A. D. 1895, between the hours of nine o'clock A. M. and six o'clock P. M. on said day and the other days to which the taking of depositions were adjourned at the office of J. S. & J. E. Bilby & Co, in the City of Quitman, in said county pursuant to the annexed notice to be read in evidence in behalf of the complainant in an action pending in The Circuit Court of the United States for the District of Nebraska in which John S. Bilby is complainant and Prentiss D. Cheney and Susan B. Alden, Executrix is interpleader, respondents.

I hereby certify that the costs of taking the depositions hereto attached aggregating $21.60 have been fully paid by the complainant John S. Bilby.

[Seal] AUGUSTUS JOHNSTON,
Notary Public.

My commission expires March 23, 1895.

Samuel O. Wisherd, of lawful age, being by me first duly sworn as herein certified deposeth, sayeth as follows:

R. W. Sabin for complainant.

Chas. E. Magoon for respondent Prentiss D. Cheney.

162 1 Q. State your name and place of residence?

A. Samuel O. Wisherd, 41, Cage County, Nebraska, living on a farm.

2 Q. On what farm are you living Mr. Wisherd?

A. I am living on Section 24, town 6, Range 7, Gage County, Nebraska.

3 Q. How long have you lived there Mr. Wisherd?

A. About twelve years I think.

4 Q. In what year did you go there?

A. My best recollection it was in 1881 or 2, I ain't certain which. 81 I think.

5 Q. What year was that?

A. That would have been 82.

6 Q. Do you remember when John A. Wisherd purchased the land, remember the circumstance of his purchasing it?

A. I do.

7 Q. You can state whether it was that year or the year following?

A. It was the year following that I was there.

8 Q. Do you know this land Section One, Town Five, Range seven, Section twenty-four town six range seven, Section nine town six range ght, Northeast quarter section five, town five, range seven, fractional west half of section six, town five, range eight all in Gage County, Nebraska?

A. I do.

9 Q. Do you know Mr. Wisherd what improvements have been made on that land since May 1881? If so state what improvements were made on it those two years and from that time up to the present time December 1892?

163 A. Well the first year that I came over there my best recollection is that it was March 1881, it might have been 1882, it is my recollection that it was the year that it was bought. Well that season there was broken out on those lands to my best recollection about 2000 acres of the land. Well that land was kept in cultivation, still in cultivation, it has been in cultivation all the while.

Q. Do you know about what proportion of section one was broken out that year?

A. I do.

Q. Well state how much it was?

A. It was all broken except thirty or forty acres.

Q. What proportion of section twenty-four was broken that year?

A. All except about 100 acres.

Q. What proportion of section nine was broken at the same time?

A. To my best recollection all except about seventy or eighty acres of it.

Q. What proportion of the Northeast quarter of section five the same year?

A. It was all broken.

Q. What proportion of the West half section six, town five was broken that same year?

A. To my best recollection about half of it.

Q. Just state if there has [—] any broken on any of these pieces of land since that time?

A. Yes, there has.

Q. State about how much and on what descriptions of land and when it was done?

164 A. Don't know as to the time it was done. It was done between the land that was first broken and the present time.

Q. Has there been any done for the last four or five years?

A. Well to my best recollection there was some broken in 1883, probably thirty or forty acres on various pieces of land. That was odds and ends and places that was broken out to square up fields. And there has been some broken out at various times since that. As to certain amount why I should think probably one hundred acres.

Q. Who was it caused that land to be broken up, who had it done?

A. When it was first broken John A. Wisherd.

Q. What proportion of that land has been in cultivation from the time it was first broken until the present time?

A. All that was broken has been in cultivation.

Q. Has there been any houses put on that land?

A. Yes, sir.

Q. State what in the way of houses and barns and [garnaries] and other buildings on section twenty-four was placed thereon by John A. Wisherd prior to the spring of 1889?

A. There were four houses put on. There was one of the houses on Northeast twenty-four, one on the northwest and two on the southeast.

Q. Well I will ask you if you know about the cost of the buildings if so you can state about the cost of each building as near as you can?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

165 A. Three of the houses to the best of my knowledge cost in the neighborhood of $250.00 or two hundred and seventy-five each. The other house cost to the best of my knowledge ten or eleven hundred dollars.

Q. State what other buildings are [—] that section and was placed there prior to 1889 by John A. Wisherd?

A. There were four small barns, frame barns.

Q. State if you know about what it cost to erect them?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I don't know the exact amount. From fifty to sixty dollars each.

Q. State whether or not that includes labor of erecting them or whether it was just a cash outlay for material?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I think that would include the labor.

Q. What other buildings were put on that section of land prior to 1889, and if you know give about the expense of the erection of them, and where they were placed. Give kinds, including granary, corn cribs and any other kind?

Respondent Cheney objects to so much of the question as relates to the cost of erection of said buildings as being incompetent, immaterial and irrelevant.

A. There was a granary built on Southeast 24, I think the dimensions 12 by 60, 12 feet high, all made out of pine lumber and roofed with the same. I don't know the exact cost, could not say. It was built out of good material, probably cost a couple hundred dollars. There was a hog house built
166 24 by 32 that was on the same quarter all built out of pine lumber probably cost about one hundred twenty-five or one hundred fifty dollars. There was a shed barn built to this granary, would be fourteen by the length of the granary, I think about sixty feet, built out of pine lumber, I think probably it would cost one hundred or one hundred twenty-five dollars. There were several other small buildings in the way of out houses and wood houses that would probably cost $100. One Fairbanks six ton scales, I don't know what they cost.

To the best of my knowledge the scale, the putting up of the [sale] and the scale would cost about about $250. to $275.

Q. You can state what there is on that section in the way of buildings that have been placed there, since the spring of 1889, and who caused that to be done?

A. There is an implement house been built since that, it is 20 by 26 all made out of pine lumber, probably cost $125.

Q. Is it a shingle roof?

A. A board roof. It was built by Mr. Bilby. There was also a corn crib 112 feet long, fourteen feet wide an average of 12 feet high roofed with pine lumber, it was all made out of pine lumber. I don't know the exact cost of it, it was built by Mr. Bilby.

Q. Can you state about the cost of it and if so state as near as you can?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. It probably cost [—] couple hundred dollars.

Q. You can state what is the condition and state of repair of the houses and other buildings and improvements
167 that you have testified to at the present time?

A. I would say very good.

Q. State what in the way of fences has been place on that section of land at what time it was made and its present condition of repair?

A. Along about the years of 82 and 83 there were probably two or three miles of fencing, it is on the east half of the section and lots. Part of it is seven wire fence and part of it is three wires. It inclosed pasture and feed lots. Since that time there has been probably [been] four or five miles built since that time. Some seven wire fences and some three wire. It's fenced clear around the section and cross fences and in fields and lots, there would be six different fields besides several feed lots. Some of them are small as thirty acres and some are as large as a couple hundred acres. They are in good repair.

Q. When was this last four miles of fence you speak of put up?

A. Well there was probably a couple miles of it put up in the last two or three years. The other was put up before that time.

Q. What portion of the fence was put up since the spring of 1889?

A. I would think probably a couple of miles was.

Q. Mr. Wisherd do you know about what it cost to put up that fence that you have testified to. If so state it as near as you can?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I think I do know very nearly its cost. I think the seven wire fence would cost about 70 cents or 80 cents a rod and there is probably about four miles of seven wire
168 fence on that section.

Q. Have you figured up the cost of the seven wire fence on section twenty-four?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I have; it would be about $475.00 or $500.00.

Q. Have you estimated the cost of the three wire fence on that section, if so state it?

Respondent Cheney objects to so much of the question as requires the witness to state the cost of the three wire fencing as being incompetent, immaterial and irrelevant.

A. The three wire fences would probably cost $250.00 or $300.00.

Q. You can state whether there are any trees and orchards on section twenty-four, and if so state the kinds and the number, when and where planted?

A. Yes there is, they are located on part of Southeast and part of South West, being about two hundred and fifty apple trees, probably fifty or seventy cherries, some plum and peach; probably twenty-five or thirty plum, about the same amount of peach; thirty or forty Russian mulberries, fifteen or twenty appricot; probably twelve or fifteen Siberian crab, there is some groves consisting of various kinds of forest trees and some willow fencing surrounding the orchard, the orchard and grove will take up eight or ten acres; I think in the year of 1883 the orchard was planted and a portion of the other different va-
riety of trees in the grove was [was] planted at the same
169 time, and since that have been filled in and more planted of the various kinds.

Q. Is there any of the orchard bearing, if so what proportion?

A. Yes, there is probably one hundred of the apple trees or more bearing and quite a number of the different varieties of the fruit.

Q. Do you know, about what the value of that orchard and trees that have been placed on there since 1881 is?

A. No, I hardly think I do.

Q. You can state in what condition the fruit trees and other trees are in at the present time?

A. I would consider them in good condition as they have been replaced every year, those that are found dead.

Q. State Mr. Wisherd if there [—] any wells on that section and if so how many and what kind, and where placed? And whether they are of a permanent character or not?

A. There is four wells; they are located at the four houses.

Q. Is there any stock wells?

A. The wells that are spoken of are used for stock purposes as well as house use; they are good wells three of them are tubular wells, one of them is a bored well with pine tubing, all have pumps in good repair and a windmill over one of the wells for pumping water, they are of a permanent character, I mean the wells.

Q. Can you state about what the cost was to put in those wells?

A. Yes, I can.

Q. You can state about how deep the wells are and what it cost to place them in the ground?

170 Respondent Cheney objects to so much of the question as relates to the cost of the wells as being incompetent, immaterial and irrelevant.

A. One of the wells is seventy feet one sixty-five, one of them sixty. Those three being the tubular wells. They cost a dollar per foot for putting them in. The other well is sixty feet being the pine tubing and cost sixty cents per foot. The tubular wells are galvanized iron piping, two inches in diameter sunk in the ground. They are all good wells and cannot be pumped dry.

Q. State if you know about what it cost to place a pump in those wells including the windmill?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. The cost of the [—] is included in the estimate heretofore given for the wells. The windmill to the best of my recollection would cost erected and complete about $125.00.

Q. You can state what permanent improvements there are in the way of houses and other buildings on section one, town five, range seven. State the time they were built and their present condition?

A. There is one house on section one, was built I think in the spring of 1882; the dimensions are 24 by 24, two stories high, three rooms below, and don't know how many above. The house has been plastered below, I don't know as to above. There is a granary there 12 by 32, 12 feet high, all out of pine lumber, board roof and a barn adjoining it of the same dimensions, average heighth of the barn ten feet. There
171 is another barn that was built I think in 1882 about the same time the house was built, dimensions would be 14 by 80 feet, is probably an average of about eight feet

high, roofed with pine lumber and all built out of pine lumber; there is also a tubular well there with a windmill over it, the well is 110 feet deep; the fencing here includes the all of section one and the fractional west half of section six, town five, range eight, there is a fence clear round the body of land, making about four miles and a half of fence. That is all three wire fences, with the exception of a mile of that, it is seven wire fence. There is cross fences through the body of land in four different fields, making in all about three miles of fence being three wire fence, and some lots and yards that is made of seven wire fence; there would probably be about ten or fifteen acres in lots and yards; there is another granary the dimensions are 12 by 32 feet and 10 feet high, all built out of pine lumber, this was built by Mr. Bilby in 1892.

Q. You can state Mr. Wisherd if you know what the cost of these improvements were, to place them on said land?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I don't know their exact cost at the time they were built.

Q. Can you tell or do you know about the amount they cost?

A. I think I can tell near about what they cost.

Q. You can state about what these improvements that you have described cost?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

172 A. Well as to the house, I would think when built, probably did cost six or seven hundred dollars; the granary with the barn adjoining did cost about two hundred and fifty dollars; the barn that is built separate I should judge did cost about one hundred fifty or one hundred seventy-five; this well and mill probably did cost two hundred and twenty-five dollars and this fencing I should judge did cost three hundred dollars; it cost the seven wire fence about seventy cents or eighty cents a rod, and the three wire thirty-five cents to forty cents per rod.

Q. You can state at what time this wire fence was put on that tract of land?

A. The greater part of this fence was built in the years of 82 to 84. Some of them have been built in the last year or two.

Q. You can state Mr. Wisherd what improvements have been placed on section nine, town six, range eight? In the way of buildings and other improvements and at what time?

A. There were three houses built I think in the year 1882, they were frame houses made of pine lum-

ber, 16 by 24 was the dimensions I think; one story buildings, two or three years afterwards the three houses were put into two and other material added so as to make them twenty-four feet square, one story; they were lathed and plastered then and put in good shape; there was a well at each place, these last places, the wells were bored wells with pine tubing and windmills over both of them, there was some barns built there at the same time made out of native timber in the shape of shed stabling,
173 stalls, and mangers and sided with pine lumber, roofed with slough grass; there is one barn that takes the place of one of those been built in the last year or two, dimensions 20 by 26, twelve feet high, all made out of pine lumber, corn crib adjoining 8 by 26 eight feet high, roofed, all in good shape and out of good material, the other place has a corn crib that is 48 feet long, fourteen feet wide an average of twelve feet high, built out of pine lumber and roofed with pine lumber, it is all inclosed in fence, clear round the section; there is three miles of that three wire fence around it and one mile of it seven wire fence, there is one mile of seven wire fence in cross fences, there is a hay bank at each one of those houses that is capable of holding about ten tons, each one, its roofed and all made out of pine lumber, been built in the last two or three years.

Q. Mr. Wisherd you may state if you know, about what it cost to put those improvements on that section?

A. I think, I could tell very nearly what they cost.

Q. Please state as near as you can what it was?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. The two houses made out of the three houses cost with the additional added, probably about four hundred dollars each; the tubular well in the present condition cost about two hundred and twenty-five dollars including the wind mill; the other well being a pine tubing well has cost in the present condition with wind mill over it, about one hundred
174 and fifty dollars; the barn made out of pine lumber here probably cost about one hundred and fifty dollars, the crib adjoining about fifty dollars, the hay banks each cost completed about forty or fifty dollars, the other stable is worth probably twenty-five or thirty dollars, the corn crib I should think, cost probably seventy or one hundred dollars; the seven wire fence cost about 75c or 80c a rod; the three wire fence would cost about 35c or 40c.

Q. Mr. Wisherd, please to describe the improvements on the Northeast quarter, section five, town five, range seven, the kinds and when they were placed on the land?

A. There is one of the houses that I had mentioned that was built on section twenty-four, was afterwards moved down to the Northeast quarter, section five, town five, range seven, I think that house was moved there in the spring of 1884.

Q. Well, you can state what additional changes was made on it if any when it was moved?

A. There was an addition built to it and material added making it a house twenty by twenty-six, one story high, plastered, put in good shape, also a well with pine tubing and wind mill over it, pump and everything complete; there is a barn there, when first built was fourteen by thirty-two, frame barn all made out of pine lumber, afterwards a granary put adjoining the barn. I think twelve by thirty-two, eight or nine feet high, all made out of pine lumber and good material; that has all been inclosed with a fence, there is a mile and a half of that three wire fence, and there is a half mile
175 of that seven wire fence; feed lot of three or four acres fenced with seven wire fence, seven wire fence around the house and orchard taking in about two acres, there are probably about twenty-five or thirty apple trees.

Q. Mr. Wisherd you can state if you know about the value of the improvements that have been placed on this quarter section, and at what time and by whom were they put on?

A. Well, I think I can tell you very nearly what they cost; they were put there by John A. Wisherd, I think about the years 1884-5-6 along there.

Q. Now you state if you can about what these improvements cost?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I think the house cost probably about three hundred dollars as stood on this quarter of land, and was worth about twenty-five or fifty dollars more than it was before it was moved off of section twenty-four; the well has cost about one hundred and fifty dollars the well including the mill; the granary and the barn together I should think had cost about two hundred dollars; the seven wire fence would cost about 70c to 80c a rod, and the three wire fence would cost thirty-five to forty cents; there is a small corn crib, I think its fourteen by sixteen, about twelve feet high covered with boards, it probably cost about twenty-five or thirty dollars.

The hour of adjournment having arrived the further taking of testimony is adjourned until nine o'clock A. M. January 18th, 1895.

.....

176 Notary Public.

January 18th, 1895, the hour having arrived for the taking of depositions was adjourned, the witness Samuel O. Wisherd resumes his testimony.

Q. Mr. Wisherd you can state whether there has been any tame grass seeding done on the land that you have already testified about, and if so state when it was done on what description of land and about how much on each description?

A. Yes there has been probably one hundred and sixty acres on twenty four, seeding done from about 1884 up to the present time, mostly in 1884-5, the seeding consisted of timothy and clover, the present condition of grasses, timothy very good, clover not very much there; its partly for grazing and partly for hay purposes; On section one and six, there is about two hundred and forty or fifty acres that has seeded to various kinds of grasses, consisting of, timothy, red clover, alsike clover, and blue grass; seeded from the years 1883 up to the present time, mostly done from 1883 to 1886, more seed of the various kinds has been sowed on same land since that, as clovers would be killed out they would be sowed again, blue grass and timothy at present time is in very good condition, but not much clover; it was used for grazing purposes. On section nine there is about one hundred acres that has been seeded to timothy and clover, mostly done in the years of 1884, and up to 1886, timothy in very fair condition, no clover; it is used for partly grazing and partly hay pur-
177 poses. On the north east quarter of five, there was seeded in the years of 1884, or five I think forty acres to tame grasses, consisting of clover and timothy which is now in other crops, it has been broken out in the last year or two. We had a good stand of grass up till the last year or two.

Q. Mr. Wisherd, do you know about what it cost per acre to seed the land, and re-seed it, taking the labor and expense of seed and caring for it and getting it in the condition which it now is?

A. Yes I can tell about, I think.

Q. Please tell about what it cost?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I should think from what experience I have in sowing grass seed that it has cost, probably about four and a half to five dollars per acre, including the different times it has been seeded. I seen to the sowing and knew at the time about the expenses of all of it.

Q. You can state what you had to do with, and knew of, all of the improvements that have been placed on these different pieces of land, that you have testified about?

A. I came there when there was nothing on the land at all to over-see and looked after all of the breaking, and of all the improvements that's been put on the land up to the present time.

Q. Mr. Wisherd, did you have anything to do, with making any payments to Prentiss D. Cheney, respondent, under a certain contract, for the purchase of said lands, dated May 2nd. 1881, betwen Cheney and John A. Wisherd?

178 A. I did.

Q. You can state what you did?

A. In May 1882 I ain't certain as to the exact date, it was between the 2nd. and probably up to the 5th I went to Tecumseh, Nebr. to the bank of Russell & Holmes, by instruction from J. A. Wisherd to pay some interest notes, that he instructed me would be there at Russell & Holmes' bank.

Q. Well what did you do, do [—] remember now whether it [—] one note or more that fell due at that time from the instructions?

A. Well, it was one note, that's my recollection of it; I went into the bank and asked the Cashier of the bank, if that note that was given to P. D. Cheney from John A. Wisherd, being an interest note on a certain body of land that he had purchased of P. D. Cheney was there and could be paid? That was there in the interest of John A. Wisherd to pay the note; they told me that the note was not there, [and] not been forwarded to them yet and that I would have to leave my money and they would notify Mr. Cheney, that the money was there for the payment of the note. I left the money there, I left the money there with Russell & Holmes, at the bank, for that purpose. My recollection is that quite a while after that probably several months, I asked John Wisherd if he had gotten the notes, I think he told me at that time he hadn't yet, but afterwards told me that he had received the note.

Q. What did you do if anything, in the following year 1893?

A. I went there in May 1893, it was between the 2nd. and up to the 5th. went to the bank of Russell & Holmes for

179 the purpose of paying the note for John A. Wisherd, being an interest note, or being a second interest note on the land he had purchased of P. D. Cheney, and told them I was there in the interest of John A. Wisherd to pay a note, and they told me the note was not there, that I would have to leave the money the same as I had before, and they would notify Mr. Cheney that the money was there to pay John A. Wisherd's interest note that was then due, and I left the money there with Russell & Holmes for that purpose.

Q. Do you know whether John A Wisherd ever got that note or not?

A. He told me he did not.

Q. State what you did, if anything, in the year 1884, on behalf of John A. Wisherd towards trying to pay up the third interest note and the first principal note?

A. I went there in May, in May 1884, to Tecumseh, Nebraska, to the bank of Russell & Holmes, between the 2nd. and the 5th. and told the people at the bank that I was there in the interest of John A. Wisherd to pay the first principal note and the third interest note, that John A. Wisherd made to Prentiss D. Cheney, for the body of land that he had purchased from him, describing the notes so they knew what I wanted and asked them if they were there, and they said they were not. I told them that I was instructed by John A Wisherd if notes were not there to make a tender of this money to the bank of Russell & Holmes and not leave it on deposit, which I did.

Q. You can state whether you told them what your reason- were for not leaving the money?

180 A. John A. Wisherd told me to tell them that he had not received his other note and as those notes were made payable there he wanted to receive them when he paid his money for them. I told either Russell or Holmes, I couldn't say which, what my instructions were.

Q. You can state whether you was prepared with money at that time to pay the notes?

A. I was.

Q. What do you know about John A. Wisherd being prepared and ready to pay those notes at any time during the year following that?

A. I never made any tenders after that, I don't know anything about it.

Q. What relation are you to John A. Wisherd?

A. I am a brother.

Q. In what capacity were you acting there on that farm?

A. For John A Wisherd.

Q. From the time you went there up to the spring of 1889?

A. I was there looking after his interest and working mostly under his instructions.

Q. What took place that spring if any that caused any change in the arrangements and possession of the lands, that you know of?

Respondent Cheney objects to the question as incompetent, immaterial and irrelevant, under the statute of fraud as tending to show a transfer of an alleged interest in land by oral testimony.

A. I went altogether from after that about the first of March by instructions from Mr. Bilby.

181 Q. What did Mr. Bilby do if anything the fore part of that year towards taking possession of these lands and leasing the lands, &c?

A. He came to me and made his arrangements with me to tend to the leasing and managing of the land for him and told me—

Respondent Cheney objects to witness stating what Bilby told him as hearsay and not binding on respondent.

to make all contracts in his name and do all business through him.

Q. You can state if you know in whose name and interest the business of conducting those lands has been in since that date?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. John S. Bilby.

Q. In what capacity have you been acting there since that time?

A. I have been manager of the business for John S. Bilby.

Q. You can state in a general way how that business has been managed and through what channel since that time?

A. Well the proceeds of all the different farms is used for the benefit of John S. Bilby. Well all shipments of stock is shipped in his name and proceeds sent to him to Quitman, Missouri. All produce sold from the farm that is not shipped proceeds are sent to him at Quitman, Missouri. All moneys that is drawn to pay expenses of running the farm is drawn from him Quitman, Missouri. Drawn by draft in the form of a check. All contracts are made in his name. All the stock is furnished by him, and all business done through his instructions. The greater part of the land is farmed

182 by tenants these tenants raise the corn by the bushel for John S. Bilby, this arrangement has been since 1889. He furnishes the land and pays them so much a bushel for corn, raised on the place and a grain rent for what small grain is raised on the place. A very small portion of the ground has been in small grain, the corn is fed to stock that belongs to Bilby and sold by him as heretofore stated. I work under salary so much per month. I receive thirty-five dollars per month and found. I am furnished house and get my living off the farm, this does not include clothes.

Q. Are you furnished groceries and such things as that?

A. No, I am not, only what is raised from the farm, such as vegetables meat and other things on the farm.

Q. Since 1889, who has been attending to the payment of taxes on this land?

A. Well, I have [when] instructed by Mr. Bilby to do it.

Q. Now, you can state whether these certificates that [—] now hand you were obtained by you for Mr. Bilby at the time that they bear date?

A. They were?

Q. Who furnished the money to redeem that land at this time?

A. Mr. Bilby.

Complainant now offers in evidence tax redemption certificates Exhibits identified by the notary, exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, & N, hereto attached and made a part hereof.

Q. You can state Mr. Wisherd whether these papers tax receipts that I hand you were received by you at about the time they bear date identified by the notary as exhibits O, P and Q?

183 A. They were.

Q. State whether these are the original receipts received by you from the County Treasurer of Gage County, Nebraska?

A. They are.

Q. Who furnished the money to pay these taxes?

A. John S. Bilby.

Complainant offers in evidence said exhibits O, P and Q and they are hereto attached and made a part hereof.

Q. Mr. Wisherd you can state if these redemption certificates now handed to you identified by the notary as Exhibits R, S, T, U and V were obtained by you of the County Treasurer of Gage County, Nebraska?

A. They were.

Q. On whose behalf and who furnished the money, and gave you instructions in regard to the obtaining of them?

A. John S. Bilby.

Q. Are these the original redemption certificates from the County Treasurer of Gage County, Nebraska?

A. They are.

Complainant offers said exhibits R, T, U and V in evidence the same are hereto attached and made a part hereof.

Q. Mr. Wisherd state whether this paper tax receipt identified by the notary as exhibit W. was obtained by you from the County Treasurer of Gage County, Nebraska, and if that is the original receipt, who furnished the money to pay the taxes and on whose behalf did you act?

A. It is. John S. Bilby furnished the money and I acted on his behalf.

184 Complainant offers said Exhibit W. in evidence and it is hereto attached and made a part hereof.

Q. Mr. Wisherd you may state what you know about the tax of 1892, on the land in controversy?

A. I went to look after the taxes of 1892, in June 27th, 1894, and the County Treasurer there told me

Respondent Cheney objects to what the County Treasurer [—] as being incompetent and hearsay.

that they had been paid. I looked the matter up and found that they had been paid by Prentiss D. Cheney.

Q. You say you went to look the taxes up, state for what purpose?

A. For the purpose of paying them.

Q. You can state whether you had the money at that time to pay the tax of 1892, or redeem from the tax sale for the tax of 1893, at the time that you went to the Treasurer's office to pay those taxes?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I had the money.

Q. State who it was furnished you the money to redeem or to pay the tax of 1892?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. John S. Bilby.

Q. State whether the time you speak of that you went to the County Treasurer of Gage County to pay the tax of 1892, was the same time mentioned in the tax receipt set

185 forth in complainant's exhibit W. and at the time that the tax of 1893, was paid?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. It was.

Q. You can state at the time that you went to pay the tax of 1892, whether you knew that the lands had been sold for taxes of that year?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. Not until I looked the matter up while there. June 27th. 1894.

Q. State Mr. Wisherd whether John A. Wisherd had the possession of any of the land in controversy either by himself or tenant on the 29th. day of May 1891?

Respondent Cheney objects as incompetent immaterial and irrelevant.

A. He did not.

Q. Who had the possession of all of the said land in controversy at that time? either by himself or tenants?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. John S. Bilby.

Q. Are you acquainted with William Long and Richard Bowman?

A. Yes sir, I am.

Q. Were they in possession of any of this land May 29th. 1891, if so state by what authority they were in possession of any of the land and what proportion of it?

A. Both there as tenants. Tenants of John S. Bilby.

Complainant rests.

186 Cross examination on behalf of respondent Cheney by Mr. Magoon.

Q. Do you know of any reason why your testimony is taken at Quitman, Missouri, and outside of the jurisdiction of the court in which this action is pending, instead of being taken in Gage County, Nebraska, where as you have testified you have lived for the past 12 years?

A. No sir, I do not.

Q. Are you related by blood or marriage with the complainant John S. Bilby?

A. No sir.

Q. How long have you known John S. Bilby?

A. I think about twenty five years.

Q. How long have you been in his daily employ?

A. Since the year of 1889, March 1889.

Q. Were you ever in his employment prior to that time?

A. Yes sir, I think I have been.

Q. When, and how long?

A. Well, at various times, probably five or six years back.

Q. Back of 1889, do you mean?

A. Yes.

Q. What was your employment for and with Mr. Bilby?

A. Well, its various things; I helped him transact a little in the country there.

Q. State the character of the business.

Objected to as incompetent, immaterial and irrelevant.

187 It was for some business done there on those farms, where I lived and on other lands there in that country.

Q. Do you mean in relation to the land in controversy?

A. Some of it was and some of it was not.

Q. State what it was?

Objected to by complainant as immaterial and incompetent.

A. It was for looking after some interests he had there in regard to some other lands outside of this body of land that is in controversy.

Q. State what you did for Mr. Bilby or by or through your employment by Mr. Bilby in regard to the land in controversy, prior to the year 1889?

Objected to by complainant as incompetent, immaterial and irrelevant.

A. He paid me for looking after the interest of that farm sometime back of that time.

Q. What interest?

Complainant objects as incompetent immaterial and irrelevant.

A. It was his interest in some chattel mortgages he had there and his ownership in some personal property.

Q. What is Mr. Bilby's business?

A. I can hardly say. He is the owner of a good deal of land, has the control of it, he is in the agricultural business in the banking business and merchandise.

Q. Is he the gentleman who has been present dur-

188 ing the taking of this deposition?

A. Yes sir. He has been present at various times but not present now.

Q. In regard to the houses to which you have testified as having been built on the land in question, were any of these houses painted?

A. Yes, sir.

Q. How many and which ones?

A. One, the one I live in.

Q. When was it painted?

A. It was last painted in the fall of 1883.

Q. How many coats of paint did it receive at that time?

A. It received three coats of paint.

Q. Do any of the houses stand on a stone or brick foundation?

A. No, sir.

Q. How are they supported, if in any way above the ground?

A. Well, some of them have rocks laid under the sills and some of them have wooden blocks.

Q. Do you mean that the corners rest on stone in some of the houses and others rest on blocks?

A. Yes sir, I do.

Q. The house you have identified as the one you live in is the largest house on section twenty-four, is it not?

A. Yes, sir.

Q. This house has recently been repaired and added to has it not?

A. No sir, nothing but repaint.

Q. Is there a porch on that house?

189 A. Yes.

Q. When was the porch built?

A. That has been built recently.

Q. When was it built?

A. In the year of 1894.

Q. Is there a kitchen built on to that house?

A. No, sir.

Q. Wasn't there an addition other than that porch built onto that house in the year 1894?

A. No, sir.

Q. Were there no improvements or additions put onto this house after it was first erected, excepting to paint it and to add the porch?

A. No, sir, I think not.

Q. What sort of posts were used in making the fences about which you have testified?

A. We have used some native posts made there in the timber in that country, mostly oak and cedar posts bought from the lumber yard.

Q. Of what kind of timber are the posts that you term native?

A. Such timber as we had there, consisting of burr oak, walnut and red elm mostly.

Q. Are there any cottonwood or box elder posts in this fence?

A. No, sir.

Q. None at all?

A. I think not.

Q. What kind of posts are those you bought at the

190 lumber yard as regard sawing, were they half sawed or quarter sawed?

A. The cedar posts were of both kinds, the oak posts were mostly split posts.

Q. What proportion of these posts were cedar posts?

A. I rather think the smaller portion of them were cedar. We generally got the oak posts when we could get them, sometime the yards would not have them, we would then take their best cedar posts.

Q. Give as near as you can the proportion of the posts in these fences which are cedar?

A. Would not probably be over one-fourth or one-fifth of them cedar.

Q. What is the average life of a cedar fence post half sawed, white cedar in that portion of Nebraska wherein this land is situated?

A. I have had them in use there six or eight years that are not rotted off yet.

Q. Do they show any signs of decay?

A. Yes they do.

Q. What is the average life of a split oak post used in a fence in that portion of Nebraska in which the land in controversy is situated?

A. Well, there is some there that has been in use six or eight years and are still in use not rotted off yet.

Q. Do they show any signs of rotting?

A. Yes, sir, I think they do.

Q. What is the average life of wire fencing such as is used in the construction of the fences to which you have testified?

A. We have some there that has been used ten or twelve years, and is still in use.

191 Q. Does the wire show any signs of the action of the elements upon it?

A. Yes, sir, I think it does.

Q. Then the fences about which you have testified have deteriorated in value since the time in which they were constructed, have they not?

A. Probably have some, but they have been kept up all the time in repair by replacing posts and wire when it was needed.

Q. You have found it necessary to replace both posts and wire in this fencing have you not by reason of the giving out of said posts and wire?

A. Yes, mostly posts. Some of the bottom wire of hog wire fences that were next to the ground we have changed and made new.

Q. Referring to the houses, have these houses situated on the land in controversy been occupied at all times since their erection?

A. Yes, sir, they have.

Q. In the month of March 1891, who beside William Long lived on section nine, town six, range eight?

Objected to as incompetent, immaterial, irrelevant.

A. There was a man by the name of Newton Long occupied that house at that time. He wasn't a married man, he had a family move in with him, I am not certain that he was

there in that month, I mean the man that was moving in with him.

Q. Will you testify that both houses on said section nine was occupied during the entire month of March 1891?

A. I am not positive as to this one we speak of, there might have been a short time that this family had not moved in.

Q. Did a man named George Shaffer live in the
192 house on section one, town five, range seven during the year 1890?

Objected to as incompetent, immaterial, irrelevant.

A. There was a man by the name of George Shaffer lived in that house, I think it was that year.

Q. What time did he move out?

A. The year that he farmed the place there, he moved out sometime before the first of March the following year.

Q. Wasn't that vacant in the month of March 1891?

Objected to as incompetent, immaterial, irrelevant.

A. It might have, it was rented, I ain't certain the parties moved in the first of March.

Q. Are any of the [garnaries,] corn cribs, or barns of which you have spoken standing on stone or brick foundation?

A. No, sir.

Q. Are any of them painted?

A. Yes, sir.

Q. Which ones?

A. The implement house.

Q. When was that painted?

A. A year ago last fall I think.

Q. Was that at the time of its erection?

A. I think it was or near about.

Q. Regarding the orchard on section twenty-four what quantity of apples do you get from that orchard a year?

A. It has not been bearing long, this fall a year ago being a bad fruit year we did not get very many, probably ten or fifteen bushels. This last season we got more, probably
193 thirty or forty bushels.

Q. Are the- all the apples you have ever gathered out of this orchard?

A. There was some few gathered in the years before that not very many.

Q. How about the peaches, how many peaches have you gathered from this orchard?

A. Could not say as to the amount, since the trees have been planted we have had three crops in various years, well there

is probably would average eight or ten bushels each year of the years that they bore.

Q. How about the apricots?

A. They have born- some this last year and year before. Year before last probably several bushels, this year not over half a bushel. They were very light this year.

Q. How about the siberian crabs?

A. They bore a few for several years back, not very many.

Q. Regarding the lands sown to tame grass what was done with the hay that was cut off this grass land?

A. It was used for feeding stock.

Q. To whom did the stock belong?

A. Well, in the years that John A. Wisherd had the land they belonged to him, in the years that Mr. Bilby had it the stock belonged to him.

Q. To whom did the stock belong that were pastured on that portion of this tame grass land that was used for pasture?

A. I would answer that in the same way. In the years that John A. Wisherd owned it it belonged to him and
194 in the years that Mr. Bilby owned it it belonged to him.

Q. If I have understood you correctly you mean to testify that the land in controversy from May 2nd. 1881 to about March 1st. 1889 was occupied either by John A. Wisherd or his tenants, and that from about the first of March 1889 to the present time said land has been occupied by the tenants of John S. Bilby, is that the fact?

Complainant objects to the question presuming a fact that has not been proven.

A. John A. Wisherd never lived on the lands to the best of my knowledge that is the way I understand it.

Q. Who received the rents and profits from this land from May 1881 to March 1st. 1889?

A. John A. Wisherd did, mostly.

Q. Who else beside John A. Wisherd received any portion of it during that time?

A. No one that I have any recollections of.

Q. Who has received the rents and profits of this land in controversy since the first of March 1889?

A. Mr. John S. Bilby.

Q. If I understood you correctly that Mr. Bilby since March 1889 has had tenants on this land, to whom he paid a stipulated sum, for each bushel of corn that they raised on said land, is that the fact?

A. Yes, sir.

Q. The ground that was used for raising small grain they paid a ground rent for by turning over to Mr. Bilby a portion of the grain so raised, is not that the fact?

195 A. Yes, sir.

Q. What was the arrangement in regard to the hay rent?

A. They got no use of the hay land.

Q. Did Bilby retain the use of the hay land? and put up the hay himself?

A. Yes, sir.

Q. How about taking care of the stock that was on said land but belonged to Mr. Bilby?

A. I looked after them.

Q. The tenants had nothing to do with that?

A. No, sir, not unless they were instructed by me to do so.

Q. If they did anything with the stock under your instructions would they be paid for such service?

A. Yes, sir.

Q. How much stock have you had up there?

A. We generally had in pasture what the pasture was able to carry, so they would have plenty of feed. Some times had more than at others. In the winter time kept enough feed, what grain we raised.

Q. Are you familiar with the rental value of agricultural lands in the locality where the lands in controversy are situated?

Objected to as incompetent, immaterial and irrelevant and not proper cross-examination.

A. I think I am.

Q. What is the rental value of farm lands such as these in controversy in that locality from May 1881 down to the present time?

196 Objected to as incompetent, immaterial and irrelevant and not proper cross examination.

A. The years of 1881 and up to 1884, and 5 they rented there for probably one third where they rented for grain rent. Money rent from one dollar and a half to two dollars, owing to improvemnts and location of the land, where they were rented for money rent, since that time they got a little higher along each year till at the present time to my best recollection of what was rented there last year in our vicinity, the grain rents would be some from half in the field to one third and two fifths delivered in town, owing to the distance from town. Money rents from $2.50 to $3.00 per acre owing to the location and improvements of the land.

Q. What was the money rental of agricultural lands situated in said locality from 1885, to 1890?

Objected to as incompetent, immaterial, irrelevant and not proper cross examination.

A. I think about the years of 1885, for cash rent would have probably rented from $2.25 to $2.50. And from the

years of that up to 1890 would have gotten a little higher each year, and for grain rent they would have rented probably from a third to two-fifths between that time.

Q. Calling your attention to section twenty-four, I ask you what would be the fair money rental value per acre of a section of land all broken out, inclosed with a wire fence, a large part of it with seven wires, divided into fields by wire fences with eight or ten acres of feed lots and yards fenced in and orchard of about ten acres surrounded with willow
197 fencing containing about one hundred apple trees in bearing condition, peach trees yielding about ten bushels a crop, apricots, cherries and siberian crabs in a bearing condition with barns, granaries, implement house, hog house, a good well with windmill over it a residence house costing from ten to eleven hundred dollars, a grove of forest trees and also a tenant house with barn and good well with 160 acres of tame grass all in good fair condition of repair?

Complainant objects as incompetent, immaterial, irrelevant and not proper cross examination.

A. It would probably rent for $2.50 per acre if you could find a man that wanted that large a farm. I should think as large a farm as that would be a little harder to rent for cash rent.

Q. You think that's all that that farm would rent for at the present time?

A. That would be my judgment.

Q. Would this section rent for any more than other lands in controversy?

A. It might, I would not think a great sight more.

Q. How many tenant houses were there on section twenty-four?

A. They were all tenant houses.

Q. How many were there?

A. There were four when first built.

Q. What was the fair rental value of section twenty-four from the spring of 1881 to 1885?

Objected to as incompetent, immaterial and irrele-
198 vant and not proper cross examination; furthermore it is not shown that the contract leads back to the spring of 1881.

A. I suppose after the years of 1881 and 1882, the years of 1883 and up to 1885 they would probably have rented from $1.50 to $2.00 cash rent.

Q. Does that inlcude the improvements that were then on said section?

A. Yes sir.

Q. What would be the rental value of said section including improvements from the spring of 1885 to 1890?

Objected to as incompetent, immaterial and irrelevant and not proper cross examination and there being no issue in the pleadings in regard to the rental value of the land in controversy.

A. Well probably in 1885-6 for cash rent it might rent from $2.00 to $2.25 and from that up to 1890, it would gradually increase a little in rental value each year to probably $2.25 to $2.50.

Q. What would be its rental value in money from 1890, up to the present time?

Objected to as incompetent, immaterial, irrelevant and not proper cross examination.

A. I would not [thing] over $2.50 per acre.

Q. What would be the rental value of section one and the fractional west half of section six of the land in controversy together with the improvements thereon during the same period?

A. About the same as twenty-four; there is not quite so many buildings, the land is a little smoother.

199 Q. Would there be any difference in the rental value of the two tracts of land mentioned estimated by the acre?

A. I hardly think there would be.

Q. State the rental value in money of section nine of the land in controversy, together with the improvements thereon, within the same periods of time mentioned?

Objected to as incompetent, immaterial, irrelevant and not proper cross examination.

A. Being a little closer to market would think it would rent about the same as the other land.

Q. State the rental value in money for the period mentioned, of the North east quarter of section five, of the land in controversy together with the improvements thereon?

A. Being further from market, would think in the different periods of time it would rent from a quarter to a half dollar less than the other land.

Q. How does the land in controversy compare with the general run of agricultural lands, in the vicinity and locality in which they are situate?

A. I would say medium.

Q. When do you say the breaking was first done on any of this land?

A. I overseen the breaking in the year 1882 first.

Q. Was there any breaking done on this land in the year 1881?

A. I think there was in the fall of 1881.

Q. How much of the land was then broken?

200 A. Just a small amount.

Q. About how much?

A. I think probably in the neighborhood of one hundred acres, probably not so much as that, I didn't have anything to do with that.

Q. Could you testify that it did not exceed one hundred and twenty acres that was broken in 1881?

A. I could not testify to any certain amount.

Q. Did it exceed two hundred acres of breaking in 1881?

A. I don't know.

Q. Did it exceed a half a section of breaking in 1881?

A. No sir, it was less.

Q. It was less than a half of a section?

A. Yes sir, it was.

Q. You went on there in 1882, did you?

A. Yes sir.

Q. And at that time only this small amount of breaking had been done?

A. Yes sir.

Q. Calling your attention to the visit to Russell & Holmes Banking house in Tecumseh, Nebraska, in the year 1884, I'll ask you to state the time and object of that visit?

A. It was in the month of May, between the 2nd. and the 5th.; I went there for the purpose of paying a principal and interest note that was made by John A. Wisherd, being a payment on this land in controversy, by instruction from John A Wisherd.

Q. Was it on the 2nd, 3rd. 4th or 5th. day that you were there?

A. I could not say as to the exact date.

201 Q. How much money did you have with you?

A. I remember of having about three thousand dollars.

Q. From whom had you received the money?

A. From John A Wisherd.

Q. Did you bring the money away with you from Tecumseh?

A. Yes sir, I did.

Q. What did you do with the money after bringing it away from Tecumseh?

A. I don't just recollect how soon but I think I turned over the greater portion of it to him.

Q. What did you do with that portion of the money which was not turned over to John A. Wisherd?

Complainant objects as incompetent, immaterial and irrelevant.

A. I don't just remember as I was there doing business for him, may [—] used some of it there.

Q. Where did you keep this money while you had it?

A. I kept it with me.

Q. On your person?

A. I think I did when [I] while I had it.

Q. How long did you keep it?

A. I couldn't say as to that.

Q. About how long?

A. Might possibly have been not over a day after I returned.

Q. Was John A. Wisherd at your place when you returned?

A. No sir, I think not.

Q. Where was you when you returned it to him?

202 A. I don't remember at what address I returned it to him.

Q. How did you deliver it to him by draft?

A. I think so.

Q. Where did you buy the draft?

A. I couldn't say, I might not have bought any draft.

Q. How did you receive this money from him?

A. I think in draft, or drafts and some currency I think I had of the proceeds of the farm there, that I was over-seeing for him.

Q. From what place did he send you the draft?

A. I don't remember.

Q. At what place was he living at that time?

A. I think his residence at that time, well I know it was Dawsonville, Missouri.

Q. Were the drafts sent you from Dawsonville, Missouri?

A. I couldn't say, I don't remember.

Q. Can you tell the state from which these drafts were sent?

A. I don't think I could.

Q. What was the amount of these drafts?

A. I don't just remember the exact amount, I know I had about three thousand dollars in all and some currency, probably several hundred dollars.

Q. State as near as you can the amount of currency you had on hand?

A. I think probably a couple of hundred dollars.

Q. Then the drafts must have been for about two thousand, eight hundred dollars?

203 A. Probably they were.

Q. Were they drawn to your order?

A. My recollection is that they were not.

Q. Were they indorsed to your order?
A. They were.
Q. Where did you cash these drafts?
A. I didn't cash them, I don't think.
Q. Did you indorse them?
A. Yes, I think I did.
Q. Did you return the same drafts to John A. Wisherd?
A. That's my recollection.
Q. Then when you went to Russell & Holmes, banking house in Tecumseh, Nebraska you had $200.00 in currency and these drafts?
A. Yes, sir.
Q. Do you know Russell & Holmes?
A. I did at the time, think I would yet.
Q. Whom did you see when you called at their banking house in relation to this matter?
A. Well, I don't remember, who it was I transacted my business with.
Q. What kind of looking man was he?
A. Well, I don't remember I had been to the bank several times before that and met Russell & Holmes, I don't know which one of them it was I done my business with.
Q. Was it one or the other of those two?
A. I rather think it was.
Q. Was it a tall man or a short man?
204 A. I don't remember.
Q. Was it an old gentleman with a grey beard?
A. I don't remember the countenance of the man.
Q. Was it a middle aged man with chin whiskers and dark hair?
A. I say I don't remember the appearance of the man.
Q. How long were you in the bank?
A. Not very long.
Q. About how long?
A. Long enough to ask in regard to the payment of the note and find out that the notes were not there, and do what business was necessary.
Q. Did you do anything more than we have already stated?
A. I talked with a party that was present.
Q. Who was that party?
A. It was some of the banking people, that seemed to know about the notes and business in general.
Q. Was it the same party that you made the other payments to?
A. Its my recollection that it was.

Q. Did you talk with him about being there to pay the notes?

A. Yes, sir, I did.

Q. Did you ask him to send for the notes?

A. I think not.

Q. Referring to the redemption of this land from tax sale, and to redemption certificates which you have identified and offered in evidence and made a part of your deposition, was the reason of securing them that the land had theretofore been sold for taxes for the years and at the time, set forth in said redemption certificates?

205 A. All I know about it is that Mr. Bilby sent me there to pay the taxes and if sold redeem it, and these receipts and certificates is what I got in settlement of the taxes.

It is admitted that the tax certificates and receipts show the facts therein set forth as to the sale of land for taxes and the redemption of the same, reference being had to the certificates heretofore introduced and made a part of this deposition. This stipulation is made by the attorneys present R. W. Sabin, for complainant, and Chas. E. Magoon for respondent Cheney.

Re-direct Examination.

By Mr. Sabin:

Q. What is the present condition and state of repair of these fences on that land at the present time?

Respondent Cheney objects as having already been testified to by the witness on direct examination as incompetent, immaterial, irrelevant, and not proper re-direct.

A. I would consider it very good.

Q. Mr. Wisherd, do you know the manner of leasing raw prairie in Gage County, Nebraska, the year 1881, and years thereafter where parties put on their own improvements and paid the taxes?

A. I think I do.

Q. How many years was it the custom at that time to lease raw prairie for the breaking and the taxes?

Respondent Cheney objects to the question as incompetent, immaterial and irrelevant, for the reason that the contract heretofore offered in evidence fixes the price to be paid for the possession, use occupancy and control of said land,

206 which contract the complainant herein seeks by this action to have specifically enforced.

A. I think about two or three years for the breaking and paying of the taxes, the next two years about a dollar an

acre and taxes, is my best recollection of that way of renting land at that time.

Q. Did any of that land have any rental value during the years of 1881 and 1882?

Respondent Cheney objects as leading, incompetent, immaterial and irrelevant for the reason stated in the last foregoing objection.

A. I wouldn't think so. There were no crops raised on the land and it was broken out in 1882, with the exception of a small portion that was broken in the fall of 1881, that was not in condition to raise a crop on in the year of 1882.

Q. You can state Mr. Wisherd, calling your attention to the time you went to Tecumseh, in 1884 to which you have testified about going to pay two notes whether your recollection is sufficiently clear on that point to be able to tell certainly whether it was one or the other, either Russell or Holmes with which you had the conversation?

A. I think it was one or the other.

The Complainant closes with this witness.

(Signature of witness) SAMUEL O. WISHERD.

The hour of adjournment having arrived, the further taking of depositions will be adjourned until tomorrow morning at nine o'clock. January 18th. 1895.

.....

Notary Public.

207 John A. Wisherd being duly sworn deposeth and sayeth as follows:

Q. State your name, age, place of residence and occupation?

A. John A. Wisherd, 44 years old, residence Stanton County, Nebraska, farmer.

Q. How long have you lived in the State of Nebraska?

A. Since I first moved to the State of Nebraska in 1889.

Q. What portion of the time have you lived there since?

A. I lived there from the spring of 1889 until the spring of 1890, I came back in July 1892 and have lived there ever since.

Q. Where did you reside the other two years?

A. I was in Texas.

Q. You can state Mr. Wisherd, whether you are the John A. Wisherd that had a certain land transaction with Prentiss D. Cheney of Jerseyville Illinois, in the year 1881.

A. I am.

Q. You can state whether that transaction was reduced to writing?

A. It was.

Q. Handing witness a paper identified by the notary as exhibit X, I'll ask you if that is the contract that was entered into at that time and also I ask you how it comes that it was acknowledged in 1883, and whether this is the first contract or whether you got one at the time that the contract was dated, and how did it come that you did not get this until 1883?

A. This was not the contract that was made, there was a contract made at that time, or rather two contracts, one in duplicate of the other and after receiving my contract
208 before it was made a matter of record I lost it, and then asked Mr. Cheney to make me a duplicate of the one which he had, and this is the contract which he sent me, it is not an exact duplicate but in substance its the same, the other contract having a deed being made after the third principal payment was made and mortgage to be executed to secure the balance.

Respondent Cheney moves to exclude so much of the answer of the witness as relates to the alleged first contract, for the reason that this should be for the specific performance of the contract set forth in complainant's bill, said testimony is incompetent, immaterial and irrelevant.

Q. You can state Mr. Wisherd that after receiving this contract this is this exhibit X whether you adopted it in lieu of the one that was lost?

A. I did.

Q. Are you acquainted with the signature of P. D. Cheney?

A. Yes, sir.

Q. I'll ask you to state in whose handwriting is the signature of this exhibit [is] made?

A. P. D. Cheney's.

Q. The respondent in this action?

A. Yes, sir.

Complainant offers in evidence the contract heretofore identified as exhibit X in evidence, a copy of which is hereto attached marked complainant's exhibit X, the original to be produced on the hearing of this case if so required by this respondent.

209 Respondent Cheney objects as incompetent, immaterial and irrelevant, no foundation laid for the introduction of the original, and objects to the copy as being incompetent no foundation laid for its use and introduction as a copy.

Q. Mr. Wisherd you can state whether you went on and took possession of the lands described in this contract described as Exhibit X, and if so in what year you took possession of the land and entered in upon the fulfillment of said contract?

Respondent Cheney objects as incompetent, immateral and irrelevant, presuming a state of facts not shown to exist.

A. I took possession of the land described in that contract in the year 1881, I took possession of them under that contract and proceeded to improve the lands in accordance with the conditions of the contract.

Respondent Cheney moves to exclude so much of the answer of the witness as relates to the improvement of said land for the reason that it is not responsive to the question.

Q. You can state Mr. Wisherd in the year 1881, if anything, by virtue of this contract on said lands, and what you did towards improving the lands in controversy?

A. I broke about 400 acres in the year 1881.

Q. You can state why there was not more broken in that year?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. My recollection is that my contract from Mr. Cheney, while it was made May 2nd. was not received from him
210 until about July the first, this four hundred acres was all that could be broken during what I considered the breaking season.

Q. What did you do towards improving the land in 1882?

A. In 1882 I broke out about fourteen hundred acres more of the land and I think there were one or two houses built.

Q. What other improvements after that, did you cause to be placed on the land, about when as near as you can recollect, and the cost of the same?

A. In the spring of 1883, there [nere] five other houses built and five stables, and some two or three miles of fencing, five wells as near as I can recollect, there was another house built on the land in the fall of 1883, and has been placed on the land altogether fifteen miles of fencing being posts and barb wire fence, five windmills together with various out buildings, orchards and groves, costing—

Respondent Cheney objects to the witness stating the cost of said improvements as incompetent, immaterial and irrelevant.

Q. Mr. Wisher, you can state whether you know what the improvements cost on that land outside of the breaking that you placed on it, prior to the first of March, 1889?

A. I do.

Q. You can state as near as you can, giving the cost of the houses, about the cost of each, and that other improvements?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. Six of the houses cost together with the stables,
211 being with each house about three hundred dollars each, two of the houses cost about five hundred dollars each, fencing cost about fifteen hundred dollars; five windmills about three hundred and fifty dollars, there were seven wells, I should say the seven wells cost about $200.00, altogether exclusive of the windmills, and there was a hog house built and some extra barns or stables at a cost of probably two hundred and fifty dollars more up to 1889, there were also seeded to tame grass being timothy and clover and blue grass about four hundred acres.

Q. You can state whether you, what the cost was to you per acre of seeding that grass, and having it in the condition it was, after the time that you mention in 1889?

A. I know what the cost.

Q. You can state as near as you can the cost and expense it was to you per acre to get that land four hundred acres seeded?

Respondent Cheney objects as incompetent, immaterial and irrelevant, grass being a [cerial] crop.

A. Cost about $1.50 per acre or about $600.00.

Q. You can state what proportion of that land that you have described that you caused to be seeded to grass, is still seeded, and whether or not you consider it to be an improvement to the land?

A. I think there are about three hundred acres of it remains seeded at the present time, and I do consider that the seeding of land to tame grass is an improvement and an advantage to the land.

Q. About how much has there been broken of the whole tract mentioned in this contract exhibit X?

212 A. I think there was broken altogether eighteen hundred to two thousand acres.

Q. What condition was that land in when you first took possession of it?

A. It was raw prairie.

Q. State whether or not raw prairie at that time had any rental value in that community?

Respondent Cheney objects as incompetent, immaterial and irrelevant the contract which the complainant seeks to have specifically enforced herein fixing the amount to be paid for the use, occupation, possession and control of the land covered by said contract.

A. I think not.

Q. You can state Mr. Wisherd what you did toward making the payments up to the year 1889, required by you to be made under said contract complainant's exhibit X.?

A. I furnished my brother the money to pay the note due in 1882 and instructed him to pay it. The notes being made payable at the office of Russell & Holmes, Tecumseh, Nebraska. My brother's instructions was to go there and take up the note due in 1882.

Q. Did he follow your instructions in regard to the payment of that note?

A. He did.

Q. Did you afterwards receive that note, and if so how soon afterwards and through what channel?

A. I did receive the note some time after he went there, either from my brother or Russell & Holmes.

213 What is the size of that note?

A. It was $905.63 I think.

Q. Have you that note?

A. I have the note.

Q. You can produce the note, is this the note you now hand me?

A. It is.

The note is identified as Exhibit Y. by the Notary.

Q. Mr. Wisherd do you remember when you gave your brother S. O. Wisherd the money to pay this note, and when he went under your directions to Russell & Holmes to Tecumseh, Nebraska, to pay it?

A. It was the first day of May 1882.

Q. Where were you at that time?

A. I was living in Missouri at the time I think I was in Atchison County, Missouri.

Complainant offers Exhibit Y in evidence.

Respondent objects as incompetent, irrelevant and immatrial, no issue being made as to the payment of said note.

Q. What did you do Mr. Wisherd in regard to paying the note that fell due in May 1883, being the note mentioned in the contract, second interest note of $905.63?

A. I sent the money to my brother S. O. Wisherd and instructed him to take it to the office of Russell & Holmes, Tecumseh, Nebr. and to pay the note $905.63, the first or second day of May 1883.

Q. Did you ever get that note back?

A. I never got that note.

214 Q. State any reason that you have or that you know of why that you did not get the note?

A. I called at the office of Russell & Holmes after the time that the note was due there and was told that the money had been forwarded to Mr. Cheney but the note had not yet been sent to their office from Mr. Cheney. I would say that it was in the latter part of month of May 1883, I think the conversation was with Mr. Holmes, I called later again I think in the month of June and found that the note had been sent there, C. A. Holmes told me—

Respondent Cheney objects to the witness stating what was told him by C. A. Holmes, as being hearsay, incompetent, immaterial and irrelevant, the respondent Cheney not being present and the conversation not being binding upon him.

that Mr. Cheney was claiming some accrued interest on the note which I refused to pay, because the note was payable at the office of Russell & Holmes and the money was there to pay it when it was due, and they refused to surrender the note and I never did get it.

Q. You can state Mr. Wisherd if you remember how much Mr. Holmes told you that Mr. Cheney claimed was still due on the note at that time?

Respondent Cheney objects as incompetent, immaterial and irrelevant as hearsay and not binding upon the respondent.

A. I do not recollect the exact amount, but my best recollection is that it was three or four dollars.

Q. You can state what you did in relation to paying off the first principal note of $1886.73 and the third interest note $905.63 that fell due May 2nd. 1884?

215 A. I sent the money for the two notes to my brother S. O. Wisherd at Adams, Nebraska, and instructed him to go to the office of Russell & Holmes at Tecumseh, Nebraska and pay the note-, and take them up, but if they were not there that he should not leave the money unless he got the notes this was the first or second day of May 1884. My recollection is that the money was sent to him in drafts, possibly part of it might have been in currency. I sent him the amount of the two notes $1886.73 and $905.63.

Q. Well you can state what was the result of your getting your notes at that time, these two notes?

A. Never got the notes and my brother did not use the money.

Q. You can state whether you went to the office of Russell & Holmes after that and made any inquiry about the notes, if so state what they told you or either of them in relation to these two particular notes last described?

Respondent Cheney objects to so much of the question as relates to the statements made to him by Russell & Holmes or either of them as hearsay and not binding upon this respondent and as incompetent, immaterial and irrelevant.

A. I went to the office of Russell & Holmes, Tecumseh, Nebraska in the latter part of the month of May 1884, prepared to pay the two notes that was due May 2nd, 1884, and asked for the notes, offered to pay them, and then found that they had not been there and that the money would have to be sent to Mr. Cheney before he would send the notes back, which I objected to for the reason that the last note paid had never been received. This conversation I think was
216 with Mr. Holmes, I cannot state positive, it was someone connected with their office.

(Parties adjourned for dinner.)

1:30 P. M. the evidence of John A. Wisherd was resumed.

[Q.] By Mr. Sabin:

Q. Mr. Wisherd did you have any correspondence with Mr. Cheney the respondent in reference to the payment of these two notes due that year from you to Cheney?

A. I did.

Q. Did you receive a letter from him?

A. I did.

Q. Have you the letter?

A. I have not.

Q. What became of it?

A. It is lost.

Q. You can state what pains you have taken to find it?

A. I made a search for [—] everywhere, I thought it could possibly be, but have failed to find it.

Q. Have you any memoranda in your possession showing about the date of the letter?

A. I have.

Q. State what you have done in making search for the letter?

A. I went through all the letter- that I had kept since that year and looked through other papers that had been kept and failed to find it anywhere.

Q. Have you made sufficient search for the letter to
217 state certainly whether or not it was lost and that you are now unable to find it?

A. I have.

Q. What is the result?

A. I have not been able to find it anywhere. I am positive it is lost.

Q. You can state the date of the letter?

A. The date of his letter was June 16th, 1884.

Q. You can state as near as you can remember the contents and substance of that letter you received from Mr. Cheney at that time?

Respondent Cheney objects as incompetent, immaterial and irrelevant, no foundation laid for the introduction.

A. I received a letter through the mails from Mr. Cheney dated Jerseyville, Illinois, June 16th, 1884, the best of my recolection is that it was a letter advising me that my contract with him for the purchase of the Gage County, land, being the lands in controversy had been forfeited under the contract, through the non-payment of the notes that fell due May 2nd, 1884, then saying that the money would have been useful to him through a panic, that is the contents of the letter as near as I can recollect.

Q. Where were you at the time you received the letter through the mails?

A. I received the letter through the mail at Dawson, Missouri.

Q. Did you make any reply to that letter?

A. Yes, sir, I answered the letter.

Q. Have you a copy of the letter that you wrote him, if so what kind of copy have you?

A. I have a letter press copy.

Q. Is the letter press copy that you have a true copy
218 of the letter that you sent him?

A. It is a true copy.

Q. How did you send the letter?

A. Through the mail.

Q. Directed where?

A. To P. D. Cheney, Jerseyville, Illinois.

Q. Will you permit the notary to take the letter and identify it?

A. I will.

The notary identifies the letter as plaintiff's exhibit Z.

Q. Where were you at the time you wrote this letter Mr. Wisherd?

A. I was in Omaha, Nebraska.

Q. When was the letter mailed?

A. It was mailed on the day it was written and the day it bears date.

Complainant offers said exhibit Z in evidence and the same is hereto attached marked as Complainant's Exhibit Z and made a part hereof.

Respondent Cheney objects as incompetent, immaterial and irrelevant.

Q. Did you receive any communication in reference to this land in controversy from Mr. Cheney after that, during that year or soon after Exhibit Z was sent to Mr. Cheney?

A. I did.

Q. State what it was?

A. I received an envelope containing the notes which I had given to Mr. Cheney for the land in controversy at Dawsonville, Missouri excepting the first two interest notes.

219 Q. Have you that envelope?

A. I have not.

Q. What became of it?

A. I do not know I presume I threw it away.

Q. How was the letter addressed and in what shape did it come?

A. It was addressed to me at Dawson, Missouri, and registered.

Q. Was there any letter in the communication?

A. I think not.

Q. Do you know the date you received it?

A. I think I received it on July 21st, it might have been a day or two before that in the year 1884.

Q. What did you do with those notes received at that time from Mr. Cheney?

A. I placed them in an envelope, sealed and addressed it to Mr. P. D. Cheney, Jerseyville, Illinois and registered it.

Q. At what date?

A. In July 21st, 1884.

Q. You can state whether or not you at that time sent a letter with the notes to Mr. Cheney?

A. I sent a letter with the notes.

Q. Have you a copy of the letter, if so what kind of a copy?

A. I have a letter press copy of the letter, the original is lost.

Q. Will you permit the Notary to identify this letter?

A. I will.

The Notary identifies the letter as complainant's exhibit 1.

Complainant offers the letter in evidence and is
220 hereto attached and made a part hereof.

Respondent objects as incompetent, immaterial and irrelevant, the objection that this is not the original letter waived.

Q. Now you can state Mr. Wisherd what was the result of that communication?

A. The result of that communication was that the notes and letter were returned to me in the same envelope unopened marked refused.

Q. Have you that envelope?

A. I have.

Q. Will you please hand it to the Notary for identification?

A. I will.

Said envelope is identified by the Notary as Complainant's exhibit 2.

Complainant offers in evidence said envelope and it is hereto attached marked Complainant's exhibit 2 and made a part hereof.

Responden Cheney objects to the offer as [incompeent] immaterial and irrelevant.

Q. Now you can state what you did about receiving it back and opening it?

A. When it was returned I did not take it out of the office, permitted it to go to the Dead Letter Office from which office it was forwarded to me, and on its arrival I took it out, containing the notes. I should say August 28th. is when I took it out of the office August 1884.

Q. Did you write to Mr. Cheney about that time in reference to these notes?

A. I did write to Mr. Cheney on August 28th. 1884
221 concerning the notes and mailed the letter to him at Jerseyville, Illinois, on August 28th. 1884.

Q. Have you a copy of that letter?

A. I have.

Q. Will you hand it to the Notary for identification?

A. I will.

The Notary identifies the letter as complainant's exhibit 3.

Q. You can state Mr. Wisherd how near an [exect] copy that is of that letter you sent?

A. It is an exact copy, it is not a letter press copy, but one that I made at the time.

Complainant offers said Exhibit 3, in evidence and it is hereto attached and made a part hereof as complainant's exhibit 3.

Respondent objects as incompetent, immaterial and irrelevant.

Q. Was the original of which Exhibit 3 is a copy, ever returned to you?

A. It was not.

Q. You can state during that year and some time after this whether there was an action commenced or several actions at law in the District Court of Gage County, Nebraska by respondent Cheney against you for the recovery of the possession of the land in controversy and said cases afterwards being transferred from the State Court to the Federal Court of Nebraska?

Question withdrawn by Complainant's attorney.

Q. Mr. Wisherd you can state what you did with those notes after having received them back from the dead
222 letter office?

A. I retained possession of the notes until January 1886 when they were returned to Prentiss D. Cheney during the course of a trial in the United States Court at Lincoln, Nebraska, involving the land in controversy in which Cheney was complainant and Wisherd defendant in interest. My tenants on this land being defendants of record in open court during said trial I handed these notes to Judge Lake my attorney in the case and he remarked to Mr. Cheney "Here are your notes we have no use for them, and laid them on the table in front of him and left them there and I seen them no more until the taking of Charles A. Holmes deposition at Tecumseh, Nebraska, in this case.

Q. Mr. Wisherd you can state whether you were present at the time that Charles A. Holmes deposition was taken at Tecumseh in this case?

A. I was.

Q. Did you see the letter and the envelope respondent Cheney's exhibit A. to Holmes deposition from Allen, Robinson & Reed purporting to contain the sixteen notes there offered in evidence by said respondent Cheney?

A. I did.

Q. You can state what you know about that letter and the [transcation] and when was the first time you had any knowledge of it?

A. The first knowledge that I had of the existence of the letter was during the taking of Holmes deposition in this case.

Q. You can state what knowledge you had prior to that time of said notes being mailed to you and what authority any

one had to act for you in relation to said notes and where
223 you were at the time?

A. I had no knowledge prior to that time of there being mailed to me and no one had any authority to act for me in the matter, I was in the State of Texas.

Q. You can state how long a period you were there before you returned and when you went there during the year?

A. I went there during the month of February the year prior to that 1890. I am mistaken it was in February 1891 and remained there. I think I Returned again the fore part of April 1891. When I came north returning to Texas during the latter part of April of the same year and remained in Texas until the following December.

Q. Were you in the State of Nebraska between the dates last mentioned?

A. I think not.

Q. Mr. Wisherd during the year 1885, what did you do towards trying to pay the notes that fell due that year, covered by this contract and all of the [unpaid] notes prior to that year?

A. During the fore part of the month of May 1885 I went to the office of Russell & Holmes, Tecumseh, Nebraska, to pay the notes which had matured up to that date, given for the land in the controversy and tendering to pay to Russell & Holmes the money for the same amounting to $5,785.00 having the same amount there in legal tender money, counting the same and demanding the notes, which were not there and could not be had.

Q. You can state whether you were notified by Russell & Holmes or either of them whether they had any instructions or orders at that time from respondent Cheney to receive the money in payment of the notes or any part of them?

224 A. When I demanded the notes they said they were not there and never had been, that they were instructed not to receive any money on them and did not receive any. They acknowledged the tender was made but would not accept it.

Q. You can state how you estimated the amount you owed Cheney at that time, arrived at that amount of money $5,785.00?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. It was the sum of the two notes that became due May 2nd. 1884, and May 2nd. 1885, with some accruing interest. I think there was a little more thrown in in order to be sure there was enough.

Q. Where did you get that money and state if you remember who was with you at the time?

A. I got the money at the First National Bank in Lincoln, Nebraska, and some one went to Tecumseh with me from that bank, I cannot just call to memory the name of the party.

Q. What did this money consist of, what kind of money?

A. My recollection is that it was all gold.

Q. After making the tender what was done with the money, what arrangements did you make at that time in regard to it?

A. I arranged to have the money kept at the First National Bank at Lincoln, Nebraska, who were instructed to pay it to him at any time he might ask for it, and I so informed Russell & Holmes on the day the tender was made there.

Q. What did you tell them about it?

225 A. I told them that this money would be kept at the First National Bank at Lincoln, Nebraska, and that Mr. Cheney could get it at any time he called for it, and the money was kept there,—can be positive that it was put there; put there or left there for that purpose.

Q. What were your instructions to the first National Bank at Lincoln, about paying this money out to Mr. Cheney, or any one authorized by him to receive it at any time he should call for it?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. They were instructed to pay it out to Mr. Cheney or any one demanding it for him.

Q. What were your arrangements with them to have that done?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. My arrangements with the First National Bank was to keep that money there for the use of Mr. Cheney at any time that he might ask for it. I refer to the same money that I tendered to Russell & Holmes.

Q. What did you do in relation to the payment of the notes falling due in the Spring of 1886, and those of prior years that had become due?

A. May 3rd. 1886, I went to the First National Bank at Lincoln Nebraska and got $5,785.00 and $2,566.00 being the amount due May 3rd. 1886, and together with some one from the First National Bank of Lincoln, went to Tecumseh, Nebraska, possibly May 5th., there were two clerks from the First National Bank, at Lincoln went with me who took the money and left the train at Tecumseh, Nebraska, instructed to go to the office of Russell & Holmes and make a tender of the money in payment of the notes falling due in 1884, 1885, and

1886, the money being in gold and silver, I remained on
226 the train and did not stop at Tecumseh.

Q. Were you personally present at the time that any of these tenders were made at the Bank of Russell & Holmes, Tecumseh, Nebraska, except that of 1885?

A. I think I was there one other time but I can't fix the year.

Q. What arrangements did you have with the First National Bank of Lincoln to continue to make these tenders each year until the spring of 1889?

Respondent Cheney desires to ask if the arrangement between the witness and the First National Bank of Lincoln, Nebraska, for the year 1887, and the years subsequent thereto was in writing.

Objected to as incompetent, immaterial and irrelevant. Both of the foregoing questions withdrawn.

Q. You may state what were your instructions to the bank in regard to paying out this last amount of money of $8,351.00 to Cheney or any one for him, authorized by him to receive it whenever he should call for it and what were your arrangements with them to have that done?

A. My instructions to them was to pay out the money to Mr. Cheney or any one representing him who might make a demand for the money at any time it might be called for.

Respondent Cheney moves to strike out the answer of the witness as incompetent, immaterial and not binding upon the respondent.

Q. You can state whether it was the arrangements between you and the First National Bank at Lincoln for the
227 bank to do that?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. It was the arrangement between me and the bank to pay the money to Mr. Cheney or any for him demanding it.

Q. Mr. Wisherd you can state with what person connected with that bank and what officials of the bank you made your arrangements with?

A. My arrangement was made with John R. Clark, Cashier, I think.

Q. Was there any arrangement in writing different from what you had had before with the First National Bank at Lincoln to continue to make these tenders in 1887, and after that time?

A. There was an arrangement made with Mr. Clark to that effect in writing.

Q. You can state whether this arrangement is contained in the paper I now hand you marked Exhibit "H." to C. S. Lippincott's deposition?

A. That was the arrangement.

Q. I'll ask you Mr. Wisherd whether there was any arrangement in relation to that whereby they was to always be ready to pay out all the money due upon which tenders had been made?

"Question is withdrawn."

Q. You can state whether in your conversation with John R. Clark Cashier, after this written arrangement was made how it was agreed between you and him in carrying out this arrangement set forth in this writing in regard to paying out the money on all the tenders that had been made in case they should be called for by Cheney or any one authorized by him to receive the money?

228 Respondent Cheney objects as incompetent, irrelevant and immaterial and not binding upon him.

A. The arrangement was that he was to pay it out at any time that Mr. Cheney or any one representing him might demand it, and receive ten per cent interest on it for whatever length of time it might be carried by the First National Bank.

Q. Who did you depend on to make these tenders after the time set forth in that written contract for you?

A. I depended on the First National Bank of Lincoln, Nebraska.

Q. You can state whether you made any different arrangement in regard to these tenders being made and the payment of that indebtedness to respondent Cheney while you owned the land?

A. No, I did not.

Q. You can state Mr. Wisherd whether you disposed of your interest in that land at sometime subsequent to 1887?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I did.

Q. You can state Mr. Wisherd handing the witness a paper which is identified by the Notary as Exhibit 4. whether this is a true copy of the deed containing the transfer of your interest of the land in controversy or a portion of it to Mr. Bilby?

A. It is.

Q. You can state at what time the deed was delivered from you to Mr. Bilby the complainant?

A. I sent it to Mr. Bilby through the mails on the 13th. day of February 1889, the same day it was executed.

229 Q. You can state where it was sent to?

A. It was put in an envelope and addressed to him at Quitman, Missouri and mailed at Stanton, Nebraska.

Q. You can state Mr. Wisherd whether the contract for this land and the consideration of it was made on the day it bears date or prior to that time?

A. It was prior to that. It was made in January before the deed was executed in February.

Q. Handing witness another paper which is identified by the notary as complainant's exhibit 5, you can state Mr. Wisherd whose signature is attached to that deed?

A. My signature.

Q. When was that deed made and executed?

A. On the 13th. day of February, 1889.

Q. At what place and how was it delivered?

A. It was made at Stanton, Nebraska, placed in an envelope and addressed to Mr. J. S. Bilby, at Quitman, Missouri and mailed on [—] 13th. day of February 1889.

Q. You can state whether the J. S. Bilby mentioned in as grantee exhibits 4. and 5. is the complainant in this action?

A. He is.

Q. You can explain Mr. Wisherd, how it came that these two deeds were executed by you and mailed to Mr. Bilby on the same day?

A. My recollection is that when I went into the Notary's office to have the deed executed that I gave him the numbers of the land from memory and asked him to write up the

230 deeds and went out of the office coming back after the deed had been prepared and signing it, and just having time to mail it on the noon train going east, overlooked the fact that one quarter of the land was not in the deed then executed; after mailing the letter coming in to the office looking over the notes that he had made of the description of the land I observed that one quarter section had not been deeded and then executed the deed for that quarter section, that is my recollection of the cause of the two deeds in place of one.

Q. This deed marked complainants certificate 5 is the deed executed by you at that time is it?

A. It is.

Q. What was the consideration that you received from Mr. Bilby for your interest in that land together with the other eighty that is also described in exhibit 4, that is not in controversy in this action?

A. I was to receive twenty dollars per [acres] for the land including the encumbrance against it which was to be assumed by Mr. Bilby and did receive the difference between the incumbrance and twenty dollars per acre.

Q. You can state about when you did receive the consideration whether it was in cash or what way?

A. I received it shortly after the sale of the land in credit on my indebtedness with Mr. Bilby.

Q. About how much were you owing him at that time?

231 A. I can't give that accurately, but to the best of my recollection I was owing J. S. Bilby and the bank of J. S. & J. E. Bilby & Co. about one hundred twenty four or five thousand dollars principal due J. S. Bilby, that is the best of my recollection.

Q. When you made the sale to him of this property what was the agreement between you and as to when you was to give him possession of the land in controversy?

A. First of March, 1889.

Q. You can state when Mr. Bilby did take possession of that land, the land in controversy?

A. The spring of 1889.

Q. You spoke about Mr. Bilby the complainant assuming the liabilty on this tract of land in controversy, you can state what his arrangements was with you with regard to carrying out the provisions of your contract, with respondent Cheney as set forth in the contract heretofore introduced in evidence and to keeping up the tenders and carrying out and paying your indebtedness to the respondent Cheney?

Respondent Cheney objects as incompetent, immaterial and irrelevant and not binding upon him and void under the statutes of fraud in Nebraska.

A. Mr. Bilby was to pay my indebtedness to Cheney but requested of me if he bought the land that I assist in keeping the matter of the tenders in good condition as the suit with Cheney had been pending in the Supreme Court of the United States as I then supposed but afterwards turned out not to be the case, he was to carry out the conditions of the

232 contract which I had made with Cheney paying my notes due Cheney for the land.

Q. You can state Mr. Wisherd, whether Mr. Bilby notified John R. Clark Cashier of the First National Bank of Lincoln, at any time for the tender of 1889, made of the change made in the ownership in this land from you to him, if so state in what way and how that was done?

Respondent Cheney objects as incompetent, immaterial, irrelevant and not binding upon him.

A. He did; some time during the month of March or April, in the spring of 1889 Mr. Bilby and I together went to Mr. Clark and told him of the transfer of the land, and Mr. Bilby

told him that he wished to have the tenders made each year as they had been doing with me, and the money paid out if Mr. Cheney should ask for it, that had been tendered up to that time and thereafter, and that he would be responsible for the money, under the same conditions that existed between me and Mr. Clark, and Mr. Clark agreed to make the tenders each year.

Q. Do you remember of Mr. Bilby giving Mr. Clark any instructions in relation what to do in case the respondent Cheney at any time accepted or took any of the money from the First National Bank, on this contract?

Respondent Cheney objects as incompetent, immaterial and irrelevant and not binding upon him.

A. My recollection is that Mr. Bilby said to Mr. Clark, that if Mr. Cheney accepted the money that he would make it good within a certain number of days, as to the exact number of days I could not be positive, but I think thirty days,
233 as the length of time in which he said he would pay the money to them, in the event that Mr. Cheney accepted it.

Q. You can state whether Mr. Clark as Cashier of that bank, signified his satisfaction and agreed with Mr. Bilby's terms and proposition?

Respondent Cheney objects as incompetent, immaterial and irrelevant and not binding upon him.

A. Mr. Clark seemed perfectly satisfied with the arrangement, and said if he called for the money he would give it to him.

Q. Do you know what Mr. Bilby's ability was at that time to have raised so large an amount of money within the time specified?

A. I think I do.

Respondent Cheney objects as incompetent, immaterial and irrelevant.

Q. What was it?

A. He was amply able to have raised it.

Q. Mr. Wisherd you can state whether after this time, you went to the First National Bank of Lincoln, to see in regard to this matter and if so, state how you came to go and at whose suggestion and request if any one?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I think I did; I think I went there in the spring of 1891 some time, by request of Mr. Bilby.

Q. Do you remember who was Cashier at that time?

A. I don't know that I do know positively, but think Mr. Calahan.

234 Q. You can state Mr. Wisherd, before the transfer from you to Mr. Bilby and the arrangements which Mr. Bilby made that you have spoken of, after you transferred your interest to him, did you make any arrangements with any other officer of the First National Bank of Lincoln, besides Mr. John R. Clark, Cashier?

Respondent objects as incompetent, immaterial and irrelevant and not binding upon him.

A. I did not, and as far as I know Mr. Bilby did not, I was never with Mr. Bilby at that bank except once.

Further taking of this deposition is deferred to 7 o'clock P M.

Q. You can state, whether or not you have had any interest in the land in controversy, that is, financial interest since the transfers of the land from you to Bilby as set forth in exhibits four and five, the deeds?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. None.

Complainant rests.

Cross-Examination on Behalf of Respondent Cheney.

By Charles E. Magoon:

Q. When was any of the land in controversy, broken up after 1882?

A. I think there was a few pieces of land that had not been cleaned up that was broken out in the following year.

Q. Was any of the raw prairie of this land broken up after 1883?

A. I think there was a few small pieces.

235 Q. About how much?

A. Possibly forty or fifty acres,—I don't [—] it would exceed more than one hundred acres.

Q. How did you send your brother the money with which to make the payment for 1882?

A. My recollection is that I sent it in a draft.

A. From what place did you send him the draft with which to make the alleged tender of 1884?

A. I may have mailed it from Burlington Junction, at Tarkio or Dawson, I do not remember exactly which place I mailed it from.

Q. Where did you buy the drafts which you sent him at that time?

A. I do not remember now just what place I bought them.

Q. What bank drew the drafts?

A. I couldn't tell just what did draw the drafts.

Q. Did you send your brother instructions as to [—] he was to do with this money?

A. Yes, sir.

Q. Were these instructions in writing?

A. They were either in writing or given to him personally.

Q. Which were they?

A. My impression is that I accompanied the- with a letter instructing him what to do with it.

Q. For how much were these drafts sent to your brother in 1884?

A. They were for the interest notes that were due $905.63 I believe, and the principal note was $1,886.73 I think.

Q. Were these drafts large enough to cover and pay, the sum of these two notes?

236 A. They were.

Q. What did your brother do with the drafts after his visit to Tecumseh, Nebraska, and his call upon the banking house of Russell & Holmes, in the month of May 1884?

A. Its possible they were returned to me, but they might have been used for some other purpose.

Q. Were these drafts secured from Mr. J. S. Bilby, or from his banking house or any banking establishment with which he was connected?

A. It might [—] possible that the draft in 1884 was, but I hardly think so.

Q. On the 18th. day of May 1885 you tendered $5,785.00 in payment of the notes and accrued interest then due was that the amount which you owed Mr. Cheney at that time on this contract and these notes?

A. I think it was a little in excess,—

I object to that as the notes are the best evidence of what was due at that time.

little in excess of the amount due on the notes that were due that spring,—past due.

Q. This tender made May 18th. 1885, was intended to cover the amount of your indebtedness to Mr. Cheney, on the contract and notes involved herein of the notes which had fallen due prior to May 18th. 1885, together with the interest thereon, was it not?

A. It was outside of the two notes that had been paid.

Q. Did you figure interest on the note which fell due in the month of May 1884?

Objected to as already having been answered.

A. I only remember that it was intended to cover the notes that had fallen due up to that date, that had not been
237 paid, with something in excess of that amount, the exact amount of excess I cannot now give from memory, nor do I just remember the notes upon which the interest was figured, if any.

Q. Did you figure interest on the note that fell due in May 1884?

A. My impression is that we did.

Q. Did you intend to?

A. We intended that that amount should cover all [principles] and interest due to that date.

Q. What did you do with this money after the alleged tender at the bank of Russell & Holmes?

A. I left it there, at the bank of Russell & Holmes,—no I am mistaken about it we went back to Lincoln with the money and left it at the First National Bank.

Q. Who had this money in their possession in going from Lincoln to Tecumseh and return, you or the Bank Clerk who accompanied you?

A. It was carried in a satchel gotten at the bank, and I think he carried it.

Q. How was it in the next year 1886, who had it in their possession you or one of the two bank clerks who accompanied you?

A. I think one of them carried it from the car to the bank at Lincoln and from the car at Tecumseh to the office of Russell & Holmes.

Q. Do you know what was done with the money with which this alleged tender was made at the bank of Russell & Holmes in 1885 and 1886, after the same was returned to the First National Bank of Lincoln, excepting what some person has told you?

238 A. I saw the same amount of money in the same bags in 1887. the reason that I think it is the same bags is because the bags had been tagged at Tecumseh, and I took them to be the sacks in which the money had been carried before.

Q. How do you know the bags were tagged in Tecumseh, in 1886?

A. I would only know that it was tagged there because it corresponded with the tag made in 1885 when I was there, I did not see it put on at Tecumseh.

Q. How much money did you pay the First National Bank of Lincoln for its services in the matter of these tenders in the year 1887?

A. My recollection is that I paid them a hundred dollars and whatever their expenses was on the trip down to Tecumseh and back.

Q. How much did you pay them for what they did for you in the matter of these tenders for the year 1888?

A. My arrangement with Mr. Clark provided for the payment of $100.00 and the expenses to Tecumseh and back, together with ten per cent interest on the money if used longer than three days, I think the money was not used longer than three days and my impression is that I paid them $100.00 and the expenses of the trip to Tecumseh and back to Lincoln.

Q. How much did you pay them for what they did for you in the matter of these tenders in the year 1886?

A. The notes will show.

Q. What was your business from 1881 to 1889?

A. I was a farmer.

Q. For what did you become indebted to Mr. Bilby in the sum of over $100,000.00?

239 A. It was for the purchase money of lands that I had bought of him together with accumulated interest and money furnished at different times for the improvement of the lands and for notes that he had bought from other parties, and money furnished for cattle, an accumulation of debts for a series of years.

Q. How many years?

A. Running as far back as 1884, and possibly further, might have been some notes older than that.

Q. What became of the land out of which this indebtedness arose?

Objected to as incompetent, immaterial and irrelevant by complainant.

A. The majority of it went back to him.

Q. Where were the lands situated?

A. In Missouri and Nebraska.

Q. What is Mr. Bilby's business?

A. He is a farmer and a banker and a dealer in lands, he is interested in stores and in a mill.

Q. Do you know how many stores he owns?

A. Do not know exactly.

Q. How many do you know he is interested in?

A. He is interested in one I think in Quitman, I am not positive.

JOHN A. WISHERD.

Respondent Cheney rests.

(Signature of witness) JOHN A. WISHERD.

240 John S. Bilby the complainant of lawful age being duly cautioned and solemnly sworn deposeth and sayeth as follows:

Q. State your name, age, place of residence and occupation?

A. John S. Bilby, live in Quitman, Missouri, age 63 years occupation farmer.

Q. Are you the complainant in this case?

A. Yes.

Q. Mr. Bilby you can state whether you purchased the interest of John A. Wisherd of the land in controversy in this case?

Respondent Cheney objects as incompetent, immaterial and irrelevant and void under the statute of fraud in Nebraska.

A. I did.

Q. Mr. Bilby take this paper plaintiff's exhibit 4, and look at it, and state if that is a copy of the deed that you received from John A. Wisherd?

A. This is a copy of the deed to a part of the land in controversy together with other lands.

Q. You can state Mr. Bilby where the original of that deed is if you know?

A. I don't know.

Q. You can state if you received the original of that deed?

A. I did.

Q. About what time?

A. Immediately after it was made, I can't recollect the day.

Q. What do you mean, the date?

A. Immediately after it was made the 13th. of February.

241 Q. You can state who it was caused the deed to be recorded?

A. I caused it to be recorded.

Q. You can state when was the last time that you recollect of seeing it?

A. I have an indistinct recollection of having seen the deed in the last year but am not certain.

Q. What have you done towards finding the deed, and searching for it so as to have it here at the taking of your testimony?

A. I have looked through my deed files and could not find it.

Q. You can state whether you have searched through your papers in every place where you thought the deed could be for it?

A. I have.

Q. And what was the result of your search?

A. Could not find it.

Q. What is your best knowledge and belief now as to where it is?

A. It is absolutely lost so far as anything as I know.

Complainant offers a certified copy of the deed which has been identified in the evindence of John A. Wisherd and marked complainant's exhibit 4, and the same is hereto attached marked exhibit 4. and made a part hereof.

Respondent Cheney objects as incompetent, immaterial and irrelevant.

Complainant's attorney handing witness deed heretofore identified in the testimony of John A. Wisherd as exhibit 5. and ask the witness to state if you received that deed and what time you received that deed?

A. I received this deed, yes about the same time I did the other one.

242 Q. Does this deed exhibit 5 and the other deed exhibit 4 constitute the transfer and conveyance of the lands in controversy of the interest of John A. Wisherd to you?

Objected to as incompetent, immaterial and irrelevant.

A. They do.

Complainant offers in evidence the last mentioned deed which is identified as exhibit 5, the same is hereto attached marked exhibit 5, and made a part hereof.

Respondent Cheney objects as incompetent, immaterial and irrelevant.

Q. Mr. Bilby, I see that this deed marked Exhibit 5, has not been recorded, you can state why it was not recorded at the time the other one was?

A. I am unable to state definitely why it was not recorded. I was under the impression that it went to record with the other deed made at the same time and through some unknown cause it was mislaid.

Q. You can state Mr. Bilby, when it was that you contracted with Mr. Wisherd or made negotiations with him for this purchase of these lands in controversy of which the deeds were the consummation?

A. The negotiations for these and other lands in Nebraska, and Missouri, were entered into and consummated between the middle of December 1888, and the date of these deeds in 1889.

Q. You can state what was the consideration by you to John A. Wisherd for the land in controversy as evidenced by these deeds?

A. I'll say that in the estimates I paid for the land in Nebraska $20.00 per acre, meaning the lands in controversy, him that amount less the amount he owed on the land, under that contract plaintiff's exhibit X.

243 Q. You can state what was your agreement with Mr. Wisherd in carrying out this contract in regard to these lands with respondent Cheney and making the payments that he was to make by virtue of said contract?

A. It was the agreement with Mr. Wisherd and myself at the time of the purchase of these lands by me that he was to aid me in making the tenders and in the final settlement with Mr. Cheney for the lands, it having been my duty under the contract in the purchase of said lands to pay off and discharge Cheney's claim to said land. My agreement with Wisherd in the purchase of the land was to pay off the indebtedness under this contract.

Q. Did you go to Lincoln, after the date of these deeds sometime in the spring of 1889, and see about making arrangements in regard to making the tenders and payments of the indebtedness due Mr. Cheney under this contract between respondent Cheney and Wisherd?

A. I did.

Q. You can state what you did and who with?

A. I went to the First National Bank of Lincoln in company with Mr. Wisherd and saw Mr. Clark Cashier about the Cheney matter, I can't fix the time, sometime during the fore part of the season, and agreed with Mr. Clark that the tenders would be made in compliance with the contract between Mr. Wisherd and Mr. Cheney for these lands, in the same manner and form as they had been formerly made by him for Mr. Wisherd. It was fully understood between Mr. Clark and myself that himself and Mr. Wisherd would look after the matter in my behalf and that I would pay their expenses in addition to the fees agreed on by him and Mr. Wisherd and that in any event

244 that Mr. Cheney should decide to take a part or all of the past due money that I would at all times pay his draft on our bank at Quitman, Missouri, for the funds so used, within thirty or sixty days, which Mr. Clark fully agreed to, I mean I would honor the drafts of Mr. Clark so drawn on me, this conversation was had in the spring of 1889, with Mr. Clark.

Q. You can state Mr. Bilby since purchasing said land of Mr. Wisherd, whether you have been ready at all times, and are still ready and able, and whether it is your desire to pay up the indebtedness under this contract that may be due, justly due to the respondent Prentiss D. Cheney?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I am fully able and willing and am anxiously waiting and have been during the whole time that I have been the

owner of the land to carry out all of my agreements with Mr. Wisherd in the payment of all the notes due under the contract herein referred to.

Q. You can state Mr. Bilby whether the tenders that have been made and expenses of such tenders have been made under your direction and arrangements since you purchased the land, and the dates covered by the dates of these two deeds?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I can only answer this question by saying that the tenders have been made through my agents, and I have paid the expenses thereof.

Q. State whether you took possession of these lands in controversy after February 13th. 1889, and if so state about
245 what time, and who has been in possession of the land since?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. I went in possession of these lands March 1st. 1889, by my tenants and have remained so ever since.

Q. You can state whether John A. Wisherd has had any possession or any interest in the land in controversy since the 1st. day of March 1889?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. None whatever.

Complainant rests.

Cross-Examination on behalf of Respondent Cheney.

By Mr. Magoon:

Q. Was the consideration which passed between you and John A. Wisherd for the alleged transfer of his rights in the land in controversy the application by you of the amount at which you agreed to value his rights in said land, upon a previous existing indebtedness of said Wisherd, to you?

A. It was; It was taken out of the indebtedness or balance of an indebtedness to me from him in a settlement with me at or about the time of the transfer of this land.

Q. In what sum was John A. Wisherd indebted to you at the time of the settlement referred to, in your last answer?

A. I cannot determine the amount of money he owed me at that settlement.

246 Q. Was his aggregated indebtedness to you and the institutions with which you are connected ever in a sum exceeding $100,000.00?

A. Yes sir, it was, it did exceed it.

Q. Did it exceed that sum in the month of December 1888?

A. Yes.

Q. Did it exceed that amount in the month of January, 1889?

A. Yes.

Q. Did it exceed that amount at any time in the month of February 1889?

A. Yes.

Q. Referring to the visit you made to Lincoln and your call you made upon that bank of that City, and the conversation with Mr. Clark, I wish to inquire if the agreement then entered into was that the agreement theretofore existing with Mr. Wisherd, should be continued with you for your use and benefit?

A. The agreement was that the tenders to Mr. Cheney were to be made in manner and form at each time when they fell due, the same as they had been while Mr. Wisherd owned the land except that I was to pay the expense instead of Mr. Wisherd.

Q. How much did you pay the First National Bank at Lincoln, Nebraska, for services rendered regarding the tenders, use of money and whatever else they did in relation to these tenders in the year 1889?

A. I can't remember what the amounts were.

Q. Did you pay them anything more than $100.00 and the expenses of going from Lincoln to Tecumseh and return?

A. I don't think I paid any more than the amount stated except Wisherd's expenses and time.

247 Q. Did you pay Wisherd's expenses and time to the First National Bank at Lincoln, Nebraska?

A. I think no.

Q. How much did you pay to the First National Bank of Lincoln, Nebraska, in the matter of these tenders in the [—] 1890?

A. I can't answer the amount.

Q. Did you pay [then] any more than $100.00 for the use of the money and the expenses of a man from Lincoln to Tecumseh and return?

A. I don't think I did.

Q. How much did you pay the First National Bank of Lincoln, Nebraska, for what they did involved herein, for the year 1891?

A. I would have to answer as I did the other one, I don't think I paid them any more.

Q. Did you pay the- any more than $100.00 for the use of the money and the expenses of a man from Lincoln to Tecumseh and return?

A. I don't think I did.

Q. Mr. Bilby how much are you worth?

A. I don't know sir.

Q. Give a fair estimate?

Objected to as incompetent, immaterial and irrelevant.

A. I don't know.

Q. Are you unable to give an estimate as to your financial worth?

A. I could give an estimate of some wealth, of some worth.

Q. Will you do so?

A. Yes.

Q. How much do you now say you are worth?

248 A. I say I am worth $100,000.00 or more.

Q. How much more?

A. I don't know.

Q. Give an estimate of how much more than $100,000.00 you are worth?

A. I might be worth $200,000.00.

Q. Might you not be worth [—] than $200,000.00?

A. Well, I think I might.

Q. In what business are you engaged?

A. Farming.

Q. And what else?

A. I am [debling] in some other little things.

Q. What are they?

A. I have a couple of these little banks, and sell a few goods, my principal business is farming.

Q. How many stores are you interested in here?

A. Practically one there are two but they go together.

Q. Do you own any stores except in Quitman, Missouri?

A. None except ranch store.

Q. How many ranch stores have you?

A. Three.

Q. You run a mill?

A. Yes, sir.

Q. Grist mill is it?

A. Yes sir. I own it but I don't run it.

Q. Have you more than one mill?

A. That's all.

249 Re-Direct.

By Mr. Sabin:

Q. Mr. Bilby you can state whether you are worth as much as $200,000.00 over and above exemptions?

A. I am.

Q. For how long a period of time have you been worth that much?

A. I have been worth that much for seven or eight years.

Cross-Examination.

Q. Has John A. Wisherd paid you all of his indebtedness to you?

A. No.

Q. About how much does he now owe?

Objected to as incompetent, immaterial and irrelevant and [—] the proper re-cross examination.

A. I could not answer it, but its not a great big amount.

Q. Give us your best estimate?

A. I can't estimate it, no great amount.

JOHN S. BILBY.

The taking of deposition is closed.

(Signature of witness) J. S. BILBY.

I, Augustus Johnston, Notary Public in and for the County of Nodaway and State of Missouri, do hereby certify that Samuel O. Wisherd, John A. Wisherd and John S. Bilby, were by me first severally duly sworn to testify to the truth, the whole truth and nothing but the truth and that these depositions by them respectively subscribed as above set forth were reduced to writing by J. D. Dunlop, who is not interested in the suit and case in controversy, in my presence and direction and in the presence of the witnesses respectively and were respectively subscribed by the said witnesses in my presence and were taken at the time and place in the annexed notice specified, that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit, and said depositions were commenced at the time said note specified and continued by adjournment from day to day as above stated.

In testimony whereof I have hereunto affixed my signature and official seal this 19th. day of January, 1895.

[Seal] AUGUSTUS JOHNSTON,
Notary Public.

My commission expires March 23rd. 1895.

[251]

$79.07 REDEMPTION CERTIFICATE No. 360

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } 8/20 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that J. S. Bilby by S. O. Wisherd has this day paid me the sum of Seventy-nine and 7/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 6th day of Dec. A. D. 1888 for the Taxes levied for the year A. D. 1887, also subsequent Taxes for year 1888 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
S. E. ¼..... ..... Ex. A A. J. N. P.	9	6	8	160

H. W. DAVIS, Treasurer.
W. C. D.

$80.28 REDEMPTION CERTIFICATE. No. 361

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE,
GAGE COUNTY, } 8/20 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that J. S. Bilby by S. O. Wisherd has this day paid me the sum of Eighty and 28/100 DOLLARS, in full for the Redemption of the following deserbed Real Estate in said County, the same having been sold on the 6th day of Dec. A. D. 1888 for the Taxes levied for the year A. D. 1887, also subsequent Taxes for year 1888 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
S. W. ¼..... ..... Ex. B. A. J. N. P.	9	6	8	160

H. W. DAVIS, Treasurer.
W. C. D.

[252]

$79.08 REDEMPTION CERTIFICATE. No. 359

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } 8/20 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that J. S. Bilby by S. O. Wisherd has this day paid me the sum of Seventy-nine and 8/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 6th day of Dec. A. D. 1888 for the Taxes levied for the year A. D. 1887, also subsequent Taxes for year 1888 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
N. W. ¼..... Ex. C. A. J. N. P.	9	6	8	160

H. W. DAVIS, Treasurer.
W. C. D

$79.07 REDEMPTION CERTIFICATE. No. 358

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } 8/20 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that J. S. Bilby by S. O. Wisherd has this day paid me the sum of Seventy-nine and 7/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 6th day of Dec. A. D. 1888 for the Taxes levied for the year A. D. 1887, also subsequent Taxes for year 1888 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
N. E. ¼..... Ex. D. A. J. N. P.	9	6	7	160

H. W. DAVIS, Treasurer.
W. C. D.

[253]

$58.67 REDEMPTION CERTIFICATE. No. 363

THE STATE of NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } 8/20 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that J. S. Bilby by S. O. Wisherd has this day paid me the sum of Fifty-eight and 67/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 8th day of Nov. A. D. 1889 for the Taxes levied for the year A. D. 1888, also subsequent Taxes for year 18— and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
N. W. ¼ ..... "Ex. E" A. J. N. P.	1	5	7	164 71-100

H. W. DAVIS, Treasurer.
W. C. D.

$44.68 REDEMPTION CERTIFICATE. No. 362.

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } 8/20 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that J. S. Bilby by S. O. Wisherd has this day paid me the sum of Forty-four and 68/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 8th day of Nov. A. D. 1889 for the Taxes levied for the year A. D. 1888, also subsequent Taxes for year 18— and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
N. E. ¼ ..... "Ex. F" A. J. N. P.	1	5	7	161 57-100

H. W. DAVIS, Treasurer.

[254]

$59.07 REDEMPTION CERTIFICATE. No. 365

THE STATE OF NEBRASKA, } ss: COUNTY TREASURER'S OFFICE,
GAGE COUNTY, } 8/20 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that J. S. Bilby by S. O. Wisherd has this day paid me the sum of Fifty-nine and 7/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 8th day of Nov. A. D. 1889 for the Taxes levied for the year A. D. 1888, also subsequent Taxes for year 18— and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
S. W. 1/4..... "Ex. G." A. J. N. P.	1	5	7	160

H. W. DAVIS, Treasurer.
W. C. D.

$59.07 REDEMPTION CERTIFICATE. No. 364

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } 8/20 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that J. S. Bilby by S. O. Wisherd has this day paid me the sum of Fifty-nine and 07/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 8th day of Nov. A. D. 1889 for the Taxes levied for the year A. D. 1888, also subsequent Taxes for year 18— and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
S. E. 1/4..... "Ex. H." A. J. N. P.	1	5	7	160

H. W. DAVIS, Treasurer.
W. C. D.

[255]

$63.88 REDEMPTION CERTIFICATE. No. 356

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } 8/20 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that J. S. Bilby by S. O. Wisherd has this day paid me the sum of Sixty-three and 88/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 6th day of Dec. A. D. 1888 for the Taxes levied for the year A. D. 1887, also subsequent Taxes for year 1887 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
N. E. ¼..... .... "Ex. J." A. J. N. P.	24	6	7	160

H. W. DAVIS, Treasurer.
W. C. D.

$63.88 REDEMPTION CERTIFICATE. No. 357

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } 8/20 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that J. S. Bilby by S. O. Wisherd has this day paid me the sum of Sixty-three and 88/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 6th day of Dec A. D. 1888 for the Taxes levied for the year A. D. 1887, also subseqent Taxes for year 1888 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
S. E. ¼..... "Ex. J" A. J. N. P.	24	6	7	160

H. W. DAVIS, Treasurer.
W. C. D.

[256]

$68.68 REDEMPTION CERTIFICATE. No. 395

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE,
COUNTY, } Septr. 22nd 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that J. S. Bilby by S. O. Wisherd has this day paid me the sum of Sixty-eight and 68/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 6 day of Decr A. D. 1888 for the Taxes levied for the year A. D. 1887, also subsequent Taxes for year 1888 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
S. W..... "Ex. K." A. J. N. P.	24	6	7	

H. W. DAVIS, Treasurer.
K.

$73.84 REDEMPTION CERTIFICATE. No. 394

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE,
COUNTY, } Septr 22 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify that John S. Bilby by S. O. Wishard has this day paid me the sum of Seventy-three and 84/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 6 day of Decr A. D. 1888 for the Taxes levied for the year 1887, also subsequent Taxes for year 1888 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
N. W..... ..... "Ex. L." A. J. N. P.	24	6	7	

H. W. DAVIS, Treasurer.
K.

[257]

$86.75 REDEMPTION CERTIFICATE. No. 396

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } Septr. 22nd 1890.

I, H. W. Davis, Treasurer of said County, do hereby certify sum that J. S. Bilby by S. O. Wishard, has this day paid me the of Eighty-six and 75/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 16 day of May A. D. 1890 for the Taxes levied for the year A. D. 1887, also Taxes for year 1888 and sub year 1889 paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
W ½ ..... "Ex. M" A. J. N. P.	6	5	8	

H. W. DAVIS, Treasurer.
K.

$63.70 REDEMPTION CERTIFICATE. No. 397

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } Septr 22 1890

I, H. W. Davis, Treasurer if said County, do hereby certify that J. S. Bilby by S. O. Wishard has this day paid me the sum of Sixty-three and 70/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 8 day of Novr A. D. 1889 for the Taxes levied for the year A. D. 18—, also subsequent Taxes for year 1888 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
N. E. ..... "Ex N" A. J. N. P.	5	5	7	

H. W. DAVIS, Treasurer.
K.

[258] TAX RECEIPT.

STATE LEVY.		
General Fund	5	Mills
Sinking "	2-8	"
School "	1	"
University "	3-8	"
Reform School Fund	1-7	"
Institute for Feeble Minded.	1-8	"
Total	6 50-56	"

COUNTY LEVY.		
General Fund	7	Mills
Sinking "	6-8	"
Bridge "	3 4-8	"
General Road Fund	1-8	"
Poor	1 4-8	"
Insane (for State)	1-8	"
Int. on O. & S. W. R. R. Bonds	1	"
TOTAL	14	"
Int. on O. & R. V. R. R. Bonds in Beatrice precinct	2	"
Int. on O. & R. V. R. R. Bonds in Blue Springs precinct	1	"
Int. on C. K. & N. Ry. Bonds in Lincoln township	5	"

CITY AND VILLAGE LEVY.		
Beatrice City—Total Levy	18 1-2	Mills
Blue Springs " "	10	"
Wymore " "	10	"
Liberty Village " "	10	"
Cortland " "	10	"
Odell " "	5	"
Barneston " "	2	"

$79.42

TREASURER'S OFFICE, GAGE COUNTY, NEB.

Beatrice, 9/22 1890.

Received of J. S. Bilby by S. O. Wishard Seventy-nine & 42/100 DOLLARS, in full for the following Taxes for the year 1889.

DESCRIPTION OF LAND OR NAME OF TOWN	Sec. or Lot	Twp. or Blk.	Rng.	Acres	Value	Amount of Tax	Advertising	Interest	Total
All..... ..... Ex. O. A. J. N. P.	24	6	7	640	2475	76 44		2 98	79 42
Am't in Road Receipt, $	Grand Total								

No. 1452. Original.

H. W. DAVIS, Treasurer.
K

[259] TAX RECEIPT.

STATE LEVY.		
General Fund	5	Mills
Sinking "	2-8	"
School "	1	"
University "	3-8	"
Reform School Fund	1-7	"
Institute for Feeble minded	1-8	"
Total	6 50-56	"

COUNTY LEVY.		
General Fund	7	Mills
Sinking "	6-8	"
Bridge "	3 4-8	"
General Road Fund	1-8	"
Poor	1 4-8	"
Insane (for State)	1-8	"
Int. on O. & S. W. R. R. Bonds	.1	"
Total	14	"
Int. on O. & R. V. R. R. Bonds in Beatrice precinct	.2	"
Int. on O. & R. V. R. R. Bonds in Blue Springs precinct	.1	"
Int. on C. K. & N. Ry. Bonds in Lincoln township	.5	"

CITY AND VILLAGE LEVY.			
Beatrice City—Total Levy		18 1-2	Mills
Blue Springs	" "	10	"
Wymore	" "	10	"
Liberty Village	" "	10	"
Cortland	" "	10	"
Odell	" "	5	"
Barneston	" "	2	"

$80.69

TREASURER'S OFFICE, GAGE COUNTY, NEB.

BEATRICE, 9/22 1890.

Received of J. S. Bilby by S. O. Wishard Eighty & 69/100 DOLLARS, in full for the following Taxes for the year 1889.

DESCRIPTION OF LAND OR NAME OF TOWN.	Sec. or Lot	Twp. or Blk	Rng.	Acres	Value	Amount of Tax	Advertising	Interest	Total
All.	1	5	7	646 28	25 15	77 70		2 99	80 69
Ex. P. A. J. N. P.									
Am't in Road Receipt, $	Grand Total								

No. 1450. Original.

H. W. DAVIS, Treasurer.
K.

TAX RECEIPT.

STATE LEVY.		
General Fund	5	Mills
Sinking "	2-8	"
School "	1	"
University "	3-8	"
Reform School Fund	1-7	"
Institute for Feeble Minded	1-8	"
Total	6 50-56	"

COUNTY LEVY.		
General Fund	7	Mills
Sinking "	6-8	"
Bridge "	3 4-8	"
General Road Fund	1-8	"
Poor	1 4-8	"
Insane (for State)	1-8	"
Int. on O. & S. W. R. R. Bonds	1	"
Total	14	"
Int. on O. & R. V. R. R. Bonds in Beatrice precinct	2	"
Int. on O. & R. V. R. R. Bonds in Blue Springs precinct	1	"
Int. on C. K. & N. Ry. Bonds in Lincoln township	5	"

CITY AND VILLAGE LEVY.		
Beatrice City - Total Levy	18 1-2	Mills
Blue Springs " "	10	"
Wymore " "	10	"
Liberty Village " "	10	"
Cortland " "	10	"
Odell " "	5	"
Barneston " "	2	"

$114.44

TREASURER'S OFFICE, GAGE COUNTY, NEB.

BEATRICE, 9/22 1890.

Received of J. S. Bilby by S. O. Wishard One hundred fourteen & 44/100 DOLLARS, in full for the following Taxes for the year 1889.

DESCRIPTION OF LAND OR NAME OF TOWN.	Sec. or Lot	Twp. or Blk.	Rng.	Acres	Value	Amount of Tax	Advertising.	Interest	Total
All	9	6	8	2400		110 16		4 28	114 44
"Ex. Q." A. J. N. P.									
Am't in Road Receipt, $	Gr	and	Total						

No. 1451. Original.

H. W. DAVIS, Treasurer.
K.

[260]

$229.38 REDEMPTION CERTIFICATE. No. 2022

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } Beatrice, Neb., 3/6 1892

I, I. J. Frantz, Treasurer of said County, do hereby certify that John S. Bilby has this day paid me the sum of Two hundred twenty-nine and 38/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 5th day of Nov. A. D. 1891 for the Taxes levied for the year A. D. 1890, also subsequent Taxes for year 1891 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
All of ..... "Ex R" A. J. N. P.	24	6	7	640

I. J. FRANTZ, Treasurer.

$303.24 REDEMPTION CERTIFICATE. No. 2025

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFEICE.
GAGE COUNTY, } Beatrice, Neb. Mch 6 1893.

I, I. J. Frantz, Treasurer of said County, do hereby certify that John S. Bilby has this day paid me the sum of Three hundred three and 29/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 5 day of Nov. A. D. 1891 for the Taxes levied for the year A. D. 1890, also subsequent Taxes for year 1891 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
All of ..... "Ex S" A. J. N. P.	9	6	8	640

I. J. FRANTZ, Treasurer.

[261]

$224.59 REDEMPTION CERTIFICATE. No. 2023

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } Beatrice, Neb., Mch 6 1893.

I, I. J. Frantz, Treasurer of said County. do hereby certify that John S. Bilby has this day paid me the sum of Two hundred twenty-four 59/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 5th day of Nov. A. D. 1891 for the Taxes levied for the year A. D. 1890, also subsequent Taxes for year 1891 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
All of ..... "Ex T" A. J. N. P.	1	5	7	640

I. J. FRANTZ, Treasurer.

$49.09 REDEMPTION CERTIFICATE. No. 2024

THE STATE OF NEBRASKA, } ss. COUNTY TREASURER'S OFFICE,
GAGE COUNTY, } Beatrice, Neb., Mch 6, 1893

I, I. J. Frantz, Treasurer of said County, do hereby certify that John S. Bilby has this day paid me the sum of Forty-Nine and 09/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 5 day of Nov. A. D. 1891 for the Taxes levied for the year A. D. 1890, also subsequent Taxes for year 1891 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
West ½..... "Ex U" A. J. N. P.	6	5	8	320

I. J. FRANTZ, Treasurer.

$62.21 REDEMPTION CERTIFICATE. No. 2026

THE STATE OE NEBRASKA, } ss. COUNTY TREASURER'S OFFICE.
GAGE COUNTY, } Beatrice, Neb., Mch 6 1893

I, I. J. Frantz, Treasurer of said County, do hereby certify that John S. Bilby has this day paid me the sum of Sixty-two

and 21/100 DOLLARS, in full for the Redemption of the following described Real Estate in said County, the same having been sold on the 5 day of Nov A. D. 1891 for the Taxes levied for the year A. D. 1890, also subsequent Taxes for year 1891 and year 18— paid by purchaser:

DESCRIPTION.	Section or Lot	Town or Block	Range	Acres
N. E ¼ "Ex V" A. J. N. P.	5	5	7	160

I. J. FRANTZ, Treasurer.

[262]

$487.59 TAX RECEIPT. No. 801.

TREASURER'S OFFICE, GAGE COUNTY, NEBRASKA.

Beatrice, Neb., 6–27, 1894.

Received of J. S. Bilby Four hundred eighty-seven and 59–100 Dollars, in full for the following Taxes for the year 1893.

DESCRIPTION OF LAND OR NAME OF TOWN.	Sec. or Lot	Town or Block	Rng.	Acres	Value
All	1	5	7	546	3200
N. E. ¼	25	6	7	160	710
N. E. ¼	5	5	7	164	790
All	9	6	8	640	3260
All	24	6	7	640	3030
W. ½	6	5	8	124	660

Am't in Road Receipt $ Grand Total

CONSOLIDAT'D TAX		Poll Tax.	No. Sch'l Dist.	School Tax.	TOWNSHIP TAX.		U. P. R. R. Precinct Tax.	C. K. & N. Precinct Tax.
State	Co'nty				Twp.	Amt.		
19.99	51.20	..	70	25.60	Han.....	16.01	....	....
4.44	11.36	..	28	5.68	Nem.....	1.42	....	....
4.94	12.64	..	63	7.90	Han.....	3.85	....	....
20.36	52.16	..	125	97.80	Adams...	19.56	....	....
18.92	48.48	..	28	24.24	Nem....	6.06	....	....
4.12	10.56	..	100	9.90	Hork....	3.30	....	....
72.77	186.40			171.12			....	....

"Ex. W."
A. J. N. P.

[263]

City Tax	Sidewalk Tax	Advertising.	Int.	Total
....	.....	.....	.....	112.80
....	.....	.....	.....	22.90
....	.....	.....	.....	29.43
....	.....	.....	.....	189.88
....	.....	.....	.....	97.70
....	.....	.....	.....	27.88
....	.....	.....	7.00	7.00
....	.....	.....	7.00	487.59

ORIGINAL. I. J. FRANTZ,
"Ex. W." Treasurer.
A. J. N. P. J. B.

264 TRUE COPY OF EXHIBIT "X."

This Indenture, made on the 2nd. day of May in the year of our Lord One Thousand Eight Hundred and Eighty One between Prentiss D. Cheney, of Jerseyville, Jersey County, Illinois, party of the first part, and John A. Wisherd of Nodaway County, Missouri, party of the second part,

Witnesseth: That in consideration of the stipulations herein contained and the payments to be made as herein specified, the first party doth by these presents demise and let to the second party the possession and use of the land herein mentioned to the said party said premises situate and being in the County of Gage, in the State of Nebraska, known and described as follows, to-wit:

All section one, town five, range seven, being.....	646.28
All section twenty-four, town six, range seven, being..	640
All section nine, town six, range eight, being.....	640.
North East Quarter section five, town five, range seven being	164.42
Fractional west half sect. six, town five range eight being	124.51
In acres a total of.....	2215.21

The sum agreed for the possession, use, occupancy and control of land is, $2792.37 yearly, which is represented and included in the notes executed by said second party described herein and also the whole amount of the taxes that are or may be assessed against said land. The purchase price of said land is Fifteen Thousand Five Hundred and Six and 47-100 Dollars, of which payment has been made of Four Hundred and

Twelve and 55-100 Dollars, at the execution of this contract. The balance is to be paid, without notice or demand therefor, in ten annual payments, at the times specified in Eighteen certain promissory notes, of even date herewith, signed by John A. Wisherd payable to the order of P. D. Cheney,

One note being for $1886.73 due three years after date.

One note being for $1886.73 due four years after date.

One note being for $1886.73 due five years after date, and five other notes for $1886.73 each due in six, seven, eight, nine, and ten years after date, which eight are the principal notes, the other ten notes being for the yearly interest, viz: First note $905.63; second note $905.63; third note $905.63; fourth note $792.43; fifth note $679.23; sixth note $566.03; seventh note $452.83; eighth note $339.63; ninth note $226.43; tenth note $113.23, due consecutively in one, two, three, four, five, six, seven, eight, nine and ten years after date, all payable at the office of Russell & Holmes in Tecumseh, Nebraska, without interest before due, and with ten per cent per annum after maturity. And the said second party, in consideration of this agreement, hereby agrees to make punctual payment of the above sums of principal and interest as each of the same respectively becomes due, and will regularly and seasonably pay all taxes and assessments against said land.

(Page 2.)

Wisherd contracts and agrees to break one third of each of the five tracts described in season of 1881. Wisherd contracts and agrees to build six dwelling houses at proper points within one year from date which dwelling houses shall be good and suitable for dwelling purposes and to cost not less than $250. each.

Cheney is to pay taxes of 1880 and to warrant against all former years taxes. Wisherd is to pay taxes of 1881,
265 and all subsequent years.

In case the second party, his legal representatives or assigns, shall pay the several sums of money aforesaid punctually at the times above limited, and shall strictly perform all [the] singular the agreements and stipulations aforesaid after their true tenor and intent, then the said first party covenant and agree to make and execute unto the said second party his heirs or assigns upon request and the surrender of this contract, a deed conveying said land in fee simple, with the ordinary covenants of warranty, reserving and excepting the right of way that may be demanded for public use for railways or common roads;—and it is hereby agreed and covenanted by the parties hereto that time and punctuality are material and essential ingredients in this contract.

And in case the second party shall fail to pay the taxes, or if the land shall be sold for taxes, or if said second party shall fail to make the payments of money for principal or interest, or to make improvements as herein agreed, upon the terms and at times herein limited, and to perform and complete all and each of the payments agreements and stipulations herein mentioned, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become null and void, and all the rights and interests hereby created or then existing in favor of the said second party or derive from him shall utterly cease and determine and the right of possession and all equitable and legal interests in the premises shall revert to and revest in said first party without any declaration of forfeiture, or any act of reentry, or any other of said first party to be performed, and without any right of said second party of reclamation or compensation for money paid or services performed. And in case if the forfeiture or annulling of this contract, the said second (page 3) party shall still be bound and liable to pay all taxes then due or assessed against said land, also all installments of principal or interest that may then be due on this contract to be regarded and considered as rent for the use of said land.

And the said first party shall have the right, immediately upon the failure of the second party to comply with the stipulations herein, to enter upon the land aforesaid, and take immediate possession thereof, together with all the fixtures, privileges and appurtenances thereon or in anywise thereunto belonging or appertaining. And the said second party hereby covenants and agrees to surrender unto the said first party, or his order or his assigns, the said land and appurtenances without delay or hindrance; and no court shall relieve the said second party from a failure to comply strictly and literally with this contract, and this instrument shall not be regarded or construed as color of title.

No modification or change of this contract can be made except by entry hereon in writing, signed by both parties. An oversight or omission of the first party to take notice of any default of the second party shall not be deemed a waiver of their right so to do at any time thereafter.

And it is further stipulated that no assignment of the premises, or of this contract, shall be valid unless with the written consent of the first party, and by indorsement of the assignment herein.

Time is declared by the parties hereto to be the essence of this contract, and the failure [of] the part of the second party to make the payments mentioned, to do and perform all the

covenants, to comply with all the agreements herein expressed, and by him agreed to be performed strictly according to the terms, boundaries and limits of the time herein mentioned, or either or any of them, fully and completely, shall immediately work forfeiture of all the right and claim of the said party of the second part to have a conveyance of the
266 land herein mentioned.

And in case of default the said second party binds himself and representatives to give up immediate possession of all said tract of land whenever a demand is made therefor by the said party of the first part or their legal representatives.

And upon the non-performance of the covenants herein mentioned or a failure to make the payments as herein specified, or any of them, at the time promised, all the rights and privileges provided in this contract, giving to said second party the right to purchase the land mentioned, shall immediately terminate. The rights of the second party hereunder shall be the rights of a tenant, and he shall hold the land under this contract as a Lease and he shall be liable and subject as a tenant under the statute regulating the relations between landlord and tenant, and in case of default the first party may enforce the provisions of this contract and also recover possession of the land, with all the fixtures, privileges, crops and appurtenances thereon; and in case of default, the action of forcible detainer shall lie against said party of the second part or his legal representatives herein.

In Testimony Whereof, the said party of the first part has signed these presents in duplicate, and the second party has hereunto set his signature the day of the date hereon.

(Signed) P. D. LHENEY.

In presence of
A. A. GOODRICH.

State of Illinois,
Jersey County—ss.

On this Eighteenth day of April, A. D. 1883, before me, A. A. Goodrich a Notary Public in and for said county, personally appeared Prentiss D. Cheney well known to me to be the identical person who signed the foregoing contract, and he acknowledged the same to be his voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal on the date last aforesaid.

[Seal] (Signed) A. A. GOODRICH,
Notary Public.

(Indorsed on back.) State of Nebraska, County of Gage, ss. Filed for record June 13th. 1883, at 7 o'clock A. M. Entered in numerical index June 13th. 1883. Recorded in Book F. Mis. rec. page 74. (Signed) A. J. Rethford, County Clerk and ex-officio recorder.

15560. First Year's Interest Note.

267 $905.63. Tecumseh, Nebraska, May 21. 1881.

Russell & Holmes, Bankers. Paid June 2nd 1883. Tecumseh, Neb.

One year after date, for value received, I promise to pay to the order of P. D. Cheney, Nine Hundred & five & 63-100 Dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent per annum after maturity.

J. A. WISHERD.

"Ex. Y." A. J. N. P.

(Indorsed on back) 3504. Without recourse on me in any event. P. D. Cheney.

"Ex. "Z." A. J. N. P."

Omaha, Nebraska, July 9, 1884.

P. D. Cheney, Esqr.,
Jerseyville, Ills.

Dear Sir:—Yours of June 19th. received and contents noted & in reply I will say that when my notes became due to you May 2nd. 1884, at the office of Russell & Holmes, Tecumseh, Neb. I sent my Brother there prepared to pay them and instructed to do so, but the notes were not there. I have since that time been there myself prepared to pay them & offered to do so & have been ready every day since they were due & am ready now to pay them if you will notify me when they will be there at Russell & Holmes office, there is where I shall expect to find each note as it becomes due & on the day it becomes due you can get your money for each and every one of them, until that time I have no use for the notes unless you should prefer to take all your money due you on principal notes at a reasonable discount & make me a deed now. In that event I could & would pay it all to you, but that is optional with you. If you should wish to do anything of the kind, name the discount you would be willing to give.

Very Respectfully yours,

JOHN A. WISHERD,
Nodaway Co., Dawson, Mo.

268 Dawson, Mo., July 21st. 1884.

P. D. Cheney, Esqr.,
Jerseyville, Ills.

Dear Sir: Yours containing my notes given to you for the purchase money of Gage Co. Neb. land received. I herewith

return them to you, I will give you the money for the two notes which were due May 2nd. 1884 just as soon as they are presented to me for payment, the other notes are not due yet & until they are due I have no use for them.

Very respectfully yours,

JOHN A. WISHERD,
Nodaway Co. Dawson, Mo.

"Ex. No. 1. A. J. N. P."

270 "EX. No. 3. A. J. N. P."

Dawson, Mo. Aug. 28th. 1884.

P. D. Cheney, Esqr.
Jerseyville, Ills.

Dear Sir: About July the 21st. I mailed a letter to you at Jerseyville, Ills. containing the notes which I had given you for the purchase money & (interest notes) of Gage County, Neb. land, which notes you had sent to me without consideration, & not for payment hence I returned them to you as before stated & the letter came back refused & I allowed it to go to the dead letter office & now it has been returned to me from them & I have taken it from the office & hold it subject to your orders. I am ready to make payments of the notes now due, when you present them for payment or ask payment of them.

Yours truly,

JOHN A. WISHERD.

271 Know All Men By These Presents:

That John A. Wisherd (single man) of the County of Stanton and State of Nebraska, for the consideration of Seven Thousand ($7000.) Dollars, hereby quit claim to John S. Bilby of the County of Stanton and State of Nebraska, the following described real estate, situated in the County of Gage and State of Nebraska, to-wit: All of section number Nine (9) in Township No. Six (6) North of range number Eight (8) E. of the 6th P. M. Also all of section number Twenty-four (24) in Township number Six (6) North of Range Number Seven East of the 6" P. M., Also all of section One (1) In township number Five (5) North of Range number Seven (7) E. of the 6" P. M., Also the W. ½ of Section Six (6) in Township Number Five (5) North of Range number Eight E. of 6" P. M., Also the W ½ N. W. ¼ of Section Three (3) in Township Number Six (6) North of Range Eight (8) E. of 6" P. M. To have and hold the same unto the said ..... and to ..... heirs and assigns forever.

In Witness Whereof I have set my hand this Thirteenth day of February 1889.

JOHN A. WISHERD.

In presence of

W. M. YOUNG.

The State of Nebraska,
Stanton County—ss.

Be It Remembered, That on the Thirteenth day of February 1889, before the undersigned W. W. Young a Notary

Public in and for said County, personally came John A. Wisherd to me known to be the identical person described in and who executed the foregoing deed as Grantor and acknowledged said instrument to be his voluntary act and deed.

272 Witness my hand and official seal the day and year last above written.

[Seal] W. W. YOUNG,
Notary Public.

State of Nebraska,
County of Gage—ss.

I, J. T. Greenwood, Register of Deeds, within and for said County and State, do hereby certify that the within and foregoing instrument of writing is a true and correct copy of the original Quit Claim executed between said parties, as appears of record in Book No. 47 at Page 497 of the Deed records of said county in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of my said office this 18 day of January A. D. 1895.

[Seal] J. T. GREENWOOD,
Register of Deeds.
By C. C. GILLESPIE, Deputy.

(Indorsed on back) Quit Claim Deed. J. A. Wisherd to J. S. Bilby. State of Nebraska, Gage County—ss. Filed for record and entered in Numerical Index in the Register of Deeds Office of said County 18th day of February 1890 at 3.45 o'clock and .... minutes P. M. and recorded in Book 47 of Deeds on Page 497. J. E. Hays, Register of Deeds. By, C. C. Gillespie, Deputy.

"EX. No. 4" A. J. N. P.

273 Know All Men By These Presents:

That John A. Wisherd—a single man, of the County of Stanton and State of Nebraska, for the consideration of One Thousand Dollars hereby quit claim to John S. Bilby of the County of Gage and State of Nebraska, the following described real estate, situated in ———— in the County of Gage and State of Nebraska, to-wit: The N. E. $\frac{1}{4}$ of Section Five (5) Township Number Five (5) North of Range No. Seven (7) East of the 6th P. M. containing One hundred and sixty acres more or less.

In Witness Whereof, I have set my hand this Thirteenth day of February 1889.

JOHN A. WISHERD.

In presence of
W. W. YOUNG.

The State of Nebraska,
Stanton County—ss.

Be It Remembered, That on the Thirteenth day of February 1889, before the undersigned W. W. Young, a Notary Public in and for said County personally came John A. Wisherd (a single man) to me known to be the identical person described in and who executed the foregoing deed as grantor, and acknowledged said instrument to be his voluntary act and deed.

Witness my hand and official seal the day and year last above written.

[Seal] W. W. YOUNG,
Notary Public.

(Indorsed on back.)

EX. 5, A. J. N. P.

Quit Claim Deed From John A. Wisherd to John S. Bilby.

274 Upon the back of said Depositions appear indorsements in words and figures following, to-wit:

No. 270 P. Rec'd & filed Jany. 28-95, & opened by order of Court April 1, 1895. E. D. Frank, Clerk.

275 Thereupon Afterwards, to-wit: On the Sixteenth day of February 1895, a Deposition was filed in said case which said Deposition is in the words and figures following, to-wit:

Depositions of witnesses taken before Fulton Jack, a Notary Public, to be used in an action wherein John S. Bilby, is complainant, and Prentiss D. Cheney, is respondent, pending in the Circuit Court of the United States for the District of Nebraska, in pursuance of the annexed notice and at the time and place therein stated. The complainant appeared by his solicitor, Robert W. Sabin, and the respondent appeared by his solicitor, Charles E. Magoon, thereupon the said respondent produced the following witnesses in their order, to-wit:

Appearances: Charles E. Magoon for respondent Cheney and R. W. Sabin for complainant Bilby.

It is hereby stipulated that the taking of these depositions may be taken in shorthand and thereafter extended in typewritten copies, and being signed by the witnesses, and certified by the Notary, may be filed, read, and considered as evidence in this case subject to proper objection.

George E. Hawkins, who being by me first duly sworn deposes and says as follows:

Q. State your name, age and place of residence?

A. George E. Hawkins, age forty-six, residence Beatrice, Nebr.

Q. What is your present employment?

A. At present Water Commissioner of the City of Beatrice.

Q. What was your occupation prior to your occupying the office of water commissioner?

276 A. Contractor and builder in this City for the past seven or eight years here, and several years in Iowa.

Q. How long have you lived in Gage County, Nebraska?

A. Eleven years.

Q. Are you familiar with the cost and value of buildings erected in Gage County, Nebraska?

A. Yes, sir.

Q. Are you familiar with the price of building material in Gage County, Nebraska?

A. Yes, sir.

Q. Are you familiar with such values for all the period covered by your residence in Nebraska?

A. Yes, sir.

Q. State if you have made an examination of the improvements in the way of buildings, etc., on section one (1), town five (5) range seven (7), section twenty-four (24) town six (6) range seven (7) section nine (9) town six (6) range eight (8), the Northeast quarter of section five (5), town five (5) range seven (7), and the fractional West half of section six (6) town five (5) range eight (8), all located and being in Gage County, Nebraska?

A. Yes, sir, I think those are the numbers of the land in which I was out some weeks ago and looked over the improvements.

Q. This is the tract of land formerly known as the Wisherd land in Gage County, Nebraska, was that the land you visited?

A. Yes, sir.

Q. Can you state the value of the improvements situated on said land?

A. Partially, I think I can as to the value of the buildings, and there are some other improvements I perhaps am

277 not so familiar with as fences, etc.

Q. State if you have examined the improvements on said land?

A. Yes, sir.

Q. When did you make such examination?

A. If I am right, about three weeks ago last Monday, don't remember just what date.

Q. Did you make a memorandum at that time showing the extent and value of the improvements?

A. Yes, sir.

Q. Have you that memorandum with you?

A. I have.

Q. State improvements and value thereof situated on section one (1) town five (5) range (7)?

Complainant objects as incompetent, immaterial, and irrelevant, that there is no issue on the part of the respondent in regard to said improvements.

A. There are as near as we could estimate eight miles of fence five wires, one well 122 feet deep with mill and tank, a house 24 by 24, a small granary, and two small buildings that are 12 by 32, there are 680 acres of it broken or under cultivation.

Q. State the condition of these improvements?

A. The house was hardly habitable, it was unplastered up stairs and perhaps two coats of plastering down stairs; no stairway, no foundation, The out buildings were in fair condition; a good well and good tank, the fences appeared to be in good order.

278 Q. State whether or not the house had ever been painted?

A. It never has.

Q. What in your judgment is the fair market value of the house?

Objected to by complainant as incompetent, immaterial and irrelevant.

A. Well, I should say a very good price for the house would be $200.00.

Q. What was the value of the out buildings?

Complainant objects [—] incompetent, immaterial, irrelevant.

A. About $155.00 for the three out-buildings.

Q. What was the value of the well including the wind mill and tank?

A. The well is 122 feet deep, tubular well, I would think $200.00.

Q. Was there any other improvements on this section which you have not mentioned?

A. I think not.

Q. How much of this section was broken up?

A. My estimate was, 684 acres under cultivation.

Q. That includes the fractional West half of section six (6) town five (5) range eight (8)?

A. Yes, sir.

Q. Together with section one (1) town five (5) range seven (7)?

A. Yes, sir.

Q. You may state the condition of those fences as to whether or not they show any wear and tear?

A. Not much, the fences on this place as far as my judgment is, are in good order, the wires were drawn and the posts in good shape, they are very well kept.

279 Q. State the amount and value of the improvements on section twenty-four (24) town six (6) range seven (7)?

Complainant objects as incompetent, immaterial and irrelevant.

A. Well, I found that to be a very well improved farm in good fair condition, my notes here that I made at the time show about 540 acres under cultivation, eight miles of seven wire fence, a house 24 by 30 two story with eight rooms; four good wells with one wind mill and tank; and another part of the land, a house 20 by 26, barn 12 by 24, and still another 14 by 20 one story with a small barn, granary 12 by 53; two barns 24 by 32, another one 12 by 32; scales; implement house; corn crib 14 by 112; an orchard, the trees are in very good shape.

Q. You may state the value of these improvements, giving the market value?

Objected to by complainant as incompetent, immaterial.

A. I don't know the value of the fences, but the best house I figure at $800.00, in its present condition, it has no foundation; the buildings outside of that are in pretty good repair. Those wells and wind mill worth $250.00; the house and barn and a little barn and shed I figure at $130.00; the other house and stable $100.00; the granary, hog house, scales $2,000.00. The Two thousand dollars include the improvements outside of the house I have mentioned, but does not include the fences.

Q. State which of these houses were in poor repair?

A. Both of them were very inferior, unpainted, without foundation, board roof, and hardly habitable it seemed to me.

Q. The two houses which you refer to are the two houses which you would designate as tenant houses?

280 A. Yes, sir.

Q. How much of this section was broke out?

A. Five hundred forty acres.

Q. You may state the character, extent, and value of the improvements on section nine (9) town six (6) range eight (8)?

Complainant objects as incompetent, immaterial and irrelevant.

A. Five hundred sixty acres under cultivation, 4¾ miles four wire fence; two houses 24 by 24, one story, three rooms

each; two wells, two tanks one very good the other very poor, and two corn cribs 26 by 52 feet seven feet high, and a little straw stable on each one of them.

Q. What was the value of these improvements?

Objected to as incompetent, immaterial, and irrelevant by complainant.

A. I put the two houses at $100.00 a piece, without foundation, and without paint, about seven or eight feet high, very inferior lumber see through it all around, and plastering very rough; and the two wells about $250.00, and corn cribs at $70.00, $35.00 apiece.

Q. How much if anything, do you allow for the stables?

A. I think they were just some poles set up and I do not consider them worth anything, in fact I thought they would be gone by Spring as the stock would eat through.

Q. What was the character of the fencing on this section?

A. The fencing was in fair condition but not so good as on the other two sections, not so well kept.

Q. You may state whether or not any of the posts were down or the wire off?

281 A. Yes, sir, the wire was down in several places and several posts were down, I noticed.

Q. You may now state the extent, character and value of the improvements on the Northeast quarter section five (5) town five (5) range seven (7)?

Complainant objects as incompetent, immaterial, and irrelevant.

A. There was a two wire fence around this, a one room house with shed made it about 20 by 26, a good well and tower on it, barn, corn crib 12 by 16 a stable 13 by 48.

Q. What condition and repair were these improvements in?

A. Very poor condition, very inferior.

Q. What was the character of the buildings when first erected?

A. Always have been poor and built of very poor material, and look as though some fellow built them himself; none of them had any foundation, all unpainted except that one good dwelling house, it was shingled.

Q. State the value of the improvements on this quarter section?

Complainant objects as incompetent, immaterial and irrelevant.

A. The house is worth about $75.00; the well and wind mill about $85. the other improvements, corn cribs, stables &c, I thought were worth $50.00

Q. Were the other improvements worth not to exceed $50.00?

A. No, sir, I think not.

Q. What was the character of the posts that were used in fencing all these tracts of land?

A. The fencing on this place was in miserable condition, wire down and lots of the posts around that thirty acres I found all of the wire, or part of it down on the ground and posts out. The other posts were in good condition. Most of them oak.

282 Q. How many if the houses on all of these tracts of land had shingled roofs?

A. Four.

Q. What kind did the others have?

A. Board roofs with the exception of this shed on this quarter section of section five (5), town five (5) range seven (7) it had shingled roof.

Q. Are you familiar with the rental values of agricultural lands in Gage County, Nebraska, for the period the year of 1881, and the present time?

A. No, sir, I am not.

Cross-Examined.

By R. W. Sabin, Solicitor for complainant.

Q. Mr. Hawkins in regard to this fencing, state how the fences were located on the land and whether it divided it into fields or not?

A. Well part of them did divide it and part did not, this thirty acres was surrounded by wire fence on the inside of the other fence, and a pasture or two cut off in some of the others.

Q. Was there some cross fences?

A. Yes, sir. On this one place there were several fences.

Q. In section twenty-four?

A. Yes, sir.

Q. How many wires were there on the fences except the one on the quarter section that had two?

A. On section one (1) town five (5) range seven (7), had five wire fence around the outside, and section nine (9) town six (6) range eight (8) had a four wire fence; and section twenty-four (24) town six (6) range seven (7) had a seven wire fence, and the others had two wires, and a seven wire fence

283 around the thirty acres.

Q. I suppose that they have convenient lots built around each place for stock, etc?

A. Two of them have, but the others have no fencing to amount to anything some little lot cut off. There is a nice lot fenced off in section one (1) town five (5) range seven (7); and

I think there is one fenced off in section nine (9) town six (6) range eight (8); several cross fences in section twenty-four (24) town six (6) range seven (7).

Q. The value that you have given to the improvements is the present value I suppose?

A. What I think, yes, sir.

Q. When did you make this examination?

A. I think three weeks ago Monday?

Q. During the month of January 1895?

A. Yes, sir.

Q. The value you have placed upon these buildings or houses, you do not pretend it was the value it took to put them there?

A. No I think not.

Q. How much is there under cultivation on the Northeast quarter of section five (5) town five (5) range seven (7)?

A. One hundred forty-five acres, or about that.

Q. Describe the condition of the orchard and trees that you saw?

A. Well the orchard appeared to be in very fair condition, surrounded by a fence, the trees looked thrifty and nice in January; seemed to be in good healthy condition.

284 Q. Did you make any estimate of the value of the orchard?

A. I included that orchard, scales, hog house, etc. in that $2000.00.

Q. Did you make an estimate of the value of the improvements on all of this land outside of the breaking and fencing?

A. I never counted it up.

Q. Did you notice any tame grass upon the land?

A. No, sir, but I asked some of the tenants about it and they said some of the land had been sown to timothy.

Q. How much do you know?

A. I did not look at it.

Q. (By Magoon) What was the character of the workmanship on the houses and outside buildings at the time they were erected?

A. Very inferior, very poor.

Q. (By Magoon) What is the natural life of a fence post in Gage County, Nebraska?

A. I can't answer as there are so many things that effect a post, it is hard to make a fair estimate.

Q. (By Magoon) Does a fence post depreciate in value by standing in the fence?

A. Certainly.

Q. (By Magoon) There is a period to its existence?

A. Yes, sir.

Q. (By Sabin) There is no definite period?

A. No, sir, there comes a time when it rots, and I think the climate has something to do with it.

Q. The fences outside of this one section Northeast quarter section five (5) town five (5) range seven (7) said to be in
285 good condition and good repair?

A. Yes, sir, all of them.

Q. Speaking about the roofs, they were board roofs were they?

A. They were common pine lumber ⅞ of an inch thick and about twelve inches wide, 10 or 12.

Q. Were they bated?

A. I do not think they were.

Q. Do they leak or not?

A. I do not think so the roof was built with an apex not liable to leak.

Q. (By Magoon) Regarding these fences that you testified that they were standing up at the present time, but can you tell how long they will remain in that condition?

A. No, sir.

GEO. E. HAWKINS.

Edward B. Sherman, being by me first duly sworn testified as follows:

Q. State your name, age and place of residence?

A. Edward B. Sherman, forty years old, live in Beatrice, Nebr.

Q. What is your occupation?

A. Real estate business.

Q. How long have you been engaged in this business?

A. Nearly twelve years.

Q. How long have you resided in Nebraska?

A. Something over fifteen years.

Q. Have you been engaged in the real estate business in Gage County, Nebraska?

286 A. During the twelve years, yes, sir.

Q. Are you familiar with the land and the improvements thereon described as follows: All of section one (1) town five (5) range seven (7), all of section twenty-four (24), town six (6) range seven, all of section nine (9), town six (6) range eight (8), the Northeast quarter of section five (5) town five (5) range seven (7), and the fractional west half of section six (6) town five (5) range eight (8); all of said land being situate in Gage County, Nebraska?

A. Yes, sir.

Q. Have you examined this land and the improvements thereon?

A. Yes, sir.

Q. When did you make such examination?

A. About three weeks ago last Monday, I think, in January.

Q. Are you familiar with the value of farms and farm improvements in the County of Gage, State of Nebraska?

A. Yes, sir.

Q. Can you state the value of the improvements on the land before described?

A. I can very closely.

Q. You may state the character, extent, and value of the improvements on section one (1) town five (5) range seven (7), Gage County, Nebraska?

Complainant objects as incompetent and immaterial.

[—] Also the west half of section six (6) town five (5) range eight (8) all included in one farm?

Complainant objects as incompetent, immaterial, and irrelevant.

A. There is about eight miles of wire fence of five wires, there is a well 122 feet deep with a Demster Mill 32 feet
287 tower, a 22 barrel tank, a house 24 by 24, two story, unfinished up stairs, and two board roof stables about 12 by 32, a small granary, about 680 acres under cultivation.

Q. State the condition of these improvements at the present time?

A. The buildings are in poor condition the other improvements are in good condition, the buildings are all unpainted; the house never has been painted I think; no foundation under the house, it is plastered down stairs, rough plastering, two coats; up stairs entirely unfinished; no foundation or cellar under it, and it is built of rather poor material, shows the effects of wear considerable.

Q. State the value of these improvements, fair market value?

Complainant objects, incompetent, immaterial, irrelevant.

A. I think the house is worth about $200.00; the well, windmill and tank about $200.00; the two out buildings about $120.00 and the granary $35.00.

Q. What is the condition of the fencing on this section?

A. In good condition. There was quite a long string of posts, the wire never been put on them, but new wire strung on the ground ready to be put on. The fences are in good condition all over the place.

Q. State the character, extent and value of improvements on section twenty-four (24) town six (6) range seven (7) in Gage County, Nebraska?

Complainant objects [—] incompetent, immaterial, irrelevant.

A. A house 24 by 30, two stories, 8 rooms, has no foundation under it, in good repair, well painted inside and out, well finished and worth about $800.00. There is another house 20 by 26, one story, board roof, worth about $100.00. Is in poor condition and is built of poor material, with this house is a barn 12 by 24, board roof, small cheap barn worth about $30.00 and is in poor condition of repair. There
288 is another house 14 by 20, one story, board roof, in poor condition, no foundation under it, a small barn with this house, also in poor condition, with board roof on it, house and barn value $100.00. four good wells, Demster windmill and tank all in good repair, worth $250.00.

Q. You mean windmill over each well?

A. Only one windmill, then there are several small buildings consisting of granary 12 by 53 with shed stable attached to it; a hog house 24 by 32, barn 12 by 32, implement house and a corn crib 14 by 112, set of scales, and orchard of about 250 trees, these buildings are all in good repair, good buildings for the purpose for which they were intended. The orchard is in nice thrifty shape, trees most of them are large enough to be bearing, improvements valued at $2000.00, in addition to the values in my last answer. There are quite a number of feed lots and pastures fenced off of this section, and as near as we could estimate there is about eight miles of wire fence. There is 540 acres under cultivation, the wire fence is in good condition, posts are in good shape, all kept up well.

Q. Referring to the two small houses on this section, state their condition as to whether or not they are habitable?

A. Well there are people living in them, but they are very poor houses, just rough board houses.

Q. What was the character of the workmanship in their erection?

A. It was poor, no particular call for good work on them rough boards.

Q. State the character, extent and value of the improvements on section nine (9) town six (6) range eight (8) in Gage County, Nebraska?

A. Two houses each 24 by 24, one story, three rooms, the houses are alike unpainted, without a foundation and they are in poor condition, they have shingle roofs and are worth about $200.00 the two, that is $100.00 a piece. There
289 is one well with Demster mill, 32 foot tower, but the well is almost worthless does not furnish any water. Worth $50.00. There is one good well with windmill 32 foot tower and tank that is worth [$200.000.] There are two corn

cribs, they are in good shape, worth $70.00 about 560 acres under cultivation and about 4¾ miles of four wire fence, fences are in fairly good shape, there are a few posts gone on this section, very little of the wire down. The fence is not in as good shape as in section twenty-four-6-7 or sections 1-5-7. And I might say there are a couple of straw stables, I would not consider worth anything.

Q. State the character, extent and value of the improvements on the Northeast quarter of section five (5) town five (5) range seven (7) in Gage County, Nebraska.

A. There is a house 20 by 26, two rooms, this house is built with a sort of a lien which makes it 26 feet wide, the main part of the house has a board roof, the other part a shingle roof, no foundation, unpainted, very poor condition worth $75.00. A good well with 32 foot tower windmill and tank worth $85.00, corn crib 12 by 16, stable 13 by 48, built of rough boards and considerably worn and run down, all worth $50.00. There is a two wire fence around the quarter, but considerable of it is down and quite a good many posts are gone. On the inside of that there are thirty acres with a seven wire fence around it, considerable of that wire lays on the ground, the posts are either gone or poor. The fence on this quarter is in poor condition and about 145 acres under cultivation.

Q. Are you familiar with the rental value of the agricultural lands in Gage County, Nebraska, and in and about the vicinity of the lands in question for the period of time
290 between May 1881 up to the present time?

A. Yes, sir.

Q. Do you know what was the rental value in question and heretofore described during the period of time between May 1881, and up to the present time?

A. Yes, sir, I know that land.

Q. State what that value was?

Complainant objects as incompetent, immaterial and irrelevant, not covered by the issues [op] the case.

A. Well I should think $2.50 an acre would be a good fair price for land like that during that time.

Q. Do you mean land that was wild or prairie land, or land broken up?

A. No, I mean take that land as it is now, during that period of time it would be worth $2.50.

Q. What was the value of its rent in the year 1881?

A. Well I think that land in 1881, rented for the purpose of having it broke up and placed under cultivation, the renter had the use of the land for about two years for breaking it and he also paid the taxes.

Cross-Examined

By R. W. Sabin, Solicitor for complainant.

Q. Did wild uncultivated land have any rental value in that country at that time?

A. About that time there was some land here that was rented in that way in 1881.

Q. Did hay land uncultivated land have any rental value at that time?

A. Not for grazing purposes.

291 Q. How many years back has it had any rental value?

A. Commencing in 1893, perhaps some land before that close to town that had value for hay purposes, but previous to that a great deal of land had no rental value.

Q. Land far out as this land in controversy, did it have a rental value, that is raw prairie in 1881, and from that to 1890?

A. Yes, sir, during that time it had rental value.

Q. Could you not get all of the hay land you wanted any where in the county, unless it was near Beatrice during that period for the taxes?

A. You could for a portion of that period.

Q. Up to about what time?

A. I think up to 1885, or possibly in 1886, there was some land in the county you could get for the taxes.

Q. I can out as far as this land is located?

A. I do not know as you could there or not.

Q. Are you familiar with the rental value of land in that country?

A. Yes, sir.

Q. Are you familiar how it rented in 1881, and that on to 1890?

A. Not for cash. I know how land has been rented for grain rent because I have rented some myself.

Q. How did it rent?

Objected to as incompetent, immaterial, irrelevant.

A. I rented some within a mile of a portion of this land for one-third of the corn crop, and tenant delivered one-third of the small grain in Beatrice within the last seven years.

Q. Have you had any personal knowledge of any land in that neighborhood being rented for cash, if so state

292 when it was?

A. I knew there has [—] some rented for cash, but I do not know the price the renters paid.

Q. That is at the present time?

A. Yes, sir.

Q. How long ago do you know of any that has been rented for cash in that neighborhood?

A. I know of land being rented there for cash in 1886, and know land that joined this in 1886 rented for cash.

Q. How much per acre?

A. I do not know. Some of Scully's. The conditions were different from this land, unimproved. The tenants owned improvements themselves and I do not know what price they paid.

Q. Do you think this land could be rented now for $2.50 an acre?

A. I think it could.

Q. In the condition it is now in?

A. Yes, sir.

Q. For how long back do you think that could have been done?

A. I think it could have been done for the last six or seven years if it was in the same condition that it is now.

Q. I suppose that the improvements and the condition that the land is in now would add to the rent?

A. The fencing would add considerable to the value and the improvements on section 24-6-7, this would add greatly to this place.

Q. The condition that the land is in would add to the rental value?

A. Yes, sir.

293 Q. The value that you have placed on these improvements I suppose was intended to be the value of about the present condition?

A. Yes, sir.

Q. Do you know what it would take to put the houses on sections one and nine and the other houses except the best house on section twenty-four at the time they were built, presume they were built in 1893?

A. I do not imagine it would cost a great deal more than the price we put on them. But on section one that house would cost some more than it is worth now but the others there never was much value in them.

Q. Have you had very much experience in building houses?

A. I have been interested in building several houses in the last four or five years and previous to that I was interested not in building houses but in building other farm improvements to considerable extent.

Q. Have you ever built a house which cost $100.00 or $150.00?

A. No, sir, I never built as cheap a one as that.

Q. Did you make an estimate at the time of the value of the orchard, that is by itself?

A. Well we talked about it considerable, but I will say that my ideas of that were more vague than anything else, I really did not know what price to put on that orchard.

Q. What would you say as to the orchard being a valuable improvement to the place?

A. Well it is a valuble improvement to the place.

Q. Is there a railroad running near this place?

A. Yes, sir, there is a town near it.

Q. How far away is the station from this land?

294 A. I think the nearest is about two and one-half miles from Adams, and then section 1-5-7 must be about four and one-half miles from Adams, it runs from two to seven miles from Adams.

Q. Would the rental value of this land be regulated by distance to the town of Beatrice?

A. Well, that is too far away from Beatrice to have any effect.

Q. They find their market in some other town?

A. Yes, sir.

EDWARD B. SHERMAN.

J. S. Grable, who being by me first duly sworn, deposes and says as follows:

Q. State your name and place of residence?

A. J. S. Grable, place of residence Beatrice.

Q. How long have you resided in Beatrice and Gage County?

A. Since 1877.

Q. In what business are you now engaged?

A. Real Estate business.

Q. How long have you been engaged in that occupation?

A. Since 1883.

Q. You may state if you are familiar with the rental values in Gage County, Nebraska?

A. Yes, sir.

Q. From the year 1881 up to the present time?

A. I am.

Q. State what was the rental value of agricultural land suitable for agricultural purposes, from the year 1881 up to the present time, state the fair market value?

295 Complainant objects as incompetent, immaterial and irrelevant.

A. It varies a great deal with the location of the land.

Q. Fixing the value upon land which lays within a distance of a railroad station of from two to six miles?

Complainant objects as incompetent, immaterial, and irrelevant.

A. From 1881 to 1887 I should say, the rental value was from $1.00 to $1.50 per acre, and within five miles from market from 1885, to 1886, to the present time, it has been higher, ranging as high as $2.50 an acre.

Q. Can you fix the values any more definite than that?

A. I do not think it would be possible.

Cross-Examined.

By R. W. Sabin, Solicitor for complainant:

Q. There was but very little land rented for cash rent in this county prior to four or five years ago, was there not Mr. Grable?

A. I have rented some for cash for eight years.

Q. Do you know anything about the rental value of land during this period within four or five miles of Adams or from three to seven miles?

A. I have never rented land in that vicinity.

Q. What was raw prairie land renting for in 1881, from that up to 1890, without improvements, any broken land?

A. Twenty-five to seventy-five cents an acre.

Q. What was it worth for grazing or haying purposes?

A. I think about the estimate I gave.

Q. As far out as twenty-five miles from Beatrice what was it worth?

296 A. I do not think it would have brought more than fifty cents an acre and a great deal of it less than that.

Q. Did it have any rental value more than possibly paying for the taxes?

Respondent objects as improper cross-examination and having already been answered by the witness.

[—] As far out as within four or five miles of Adams?

A. I should say it had more value than that even for haying purposes.

Q. Do you know this land in controversy?

A. No I do not.

Q. Have you any knowledge or opinion of what the rental value of this particular land is?

A. I have not I never heard of the land.

Q. Do you know the land?

A. No, sir.

Q. Now you say from 1881 to 1887 the rental value was $1.50, now what do you mean by that, what kind of land would you have reference to?

A. Land under cultivation.

Q. And improvements?

A. With or without improvements.

Q. You say it has ranged as high as $2.50 an acre, what kind of land?

A. Well improved land, and as far as I know has not rented for that price.

Q. How long back has well improved land rented for that?

A. I should say about six years.

Q. Land in this county prior to 1890, most invariably rented for grain rent.

297 Respondent objects as incompetent, immaterial, irrelevant.

A. Yes, sir, it did.

Q. Land renting for $2.50 an acre would be land near Beatrice, or in what locality would you say?

A. I should say that it would be well improved land and so near a good market that a man could make three or four trips a day to market.

J. S. GRABLE.

Mr. Fletcher, who being by me first duly sworn testified as follows:

Q. Mr. Fletcher state your name place of residence?

A. J. C. Fletcher, live in Beatrice.

Q. What is your official position in Gage County, Nebraska?

A. Coroner.

Q. How long have you resided in Gage County?

A. Twenty-four years.

Q. Have you ever been engaged in the real estate business?

A. Yes, sir.

Q. Are you acquainted with the rental value of land between the year 1881, and at the present time?

A. Well, yes from the time I went in the real estate business that was in 1885.

Q. Are you familiar with the rental value of agricultural lands in Gage County, Nebraska for the period of time based from 1885 up to the present time?

A. I think so.

Q. Do you know the rental value of land from 1881 to 1885?

A. No I can't say that I do.

298 Q. State what would be the rental value of improved agricultural lands in Gage County, Nebraska, lying within a distance of two to six miles from the town of Adams, in said County, for the period of time within the years 1885 and up to the present time?

Complainant objects as incompetent, immaterial and irrelevant.

A. Well, the rental value of land varies, but at that time land was rented for $1.50 to $2.00 an acre.

Q. From what time to what time commencing with 1885, did agricultural land in Gage County rent for $1.50 an acre?

A. Of course some rented for that up to 1890, and it depended considerably upon the farm and improvements, but that was the average $1.50 to $2.00 an acre.

Q. Depended upon the location as in regard to market, did it not?

A. Yes, sir.

Q. Land that lays within two miles of a market well improved, would be worth how much?

Complainant objects, incompetent, immaterial.

A. At [what] time 1885, worth $1.75 an acre.

Q. When would it become $2.00 an acre?

A. Well, I do not know, probably in 1890.

Q. And what would it be worth since 1890?

A. The rents have advanced since, they would rent about eight miles from Beatrice, at about $2.50.

Cross-Examined.

By R. W. Sabin, Solicitor for complainant.

Q. Do you know this land in controversy Mr. Fletcher?

299 A. I do not.

Q. What was the rental value of raw prairie during the periods spoken of and prior to that time?

A. I think at that time for fifty cents an acre, grass lands.

Q. Could you testify as to what the rental value of this particular land was during these periods?

A. I could not.

Q. Do you know what they rented it for in the vicinity of Adams?

A. I do not?

Q. This land was near Beatrice, was it not?

A. Eight miles.

Q. Beatrice afforded a market for the hay did it not, for land within a reasonable distance?

A. Yes, sir.

Q. Did not that add to the rental value of raw prairie for hay land?

A. I do not think that it did.

Q. You think that land would rent as well twenty to twenty-five miles away from Beatrice?

A. Yes sir, grass land or hay land.

Q. How long back?

A. Back to 1885.

Q. Prior to 1885, it had no rental value?

Respondent objects as incompetent, immaterial, no foundation the witness having testified that he was not familiar with the rents of land prior to 1885.

Q. Can you state Mr. Fletcher if you do know the rental value of raw prairie prior to that time in this county
300 and vicinity, around over the country?

A. I can state that it rented prior to that time at twenty-five cents an acre.

Q. How near Beatrice?

A. I do not think that makes very much difference Mr. Sabin, that possibly would be quite a distance from Beatrice.

Q. Do you not know of thousands of acres of land being mowed in this country that there is no rent paid for at all and is lying idle?

Respondent objects as incompetent, immaterial, having already been answered by witness.

A. I know a great deal of land that grass is taken off without any rent of non-residents.

Q. Now is it not a fact that until within a few years grass land had no rental value only a short distance from Beatrice?

Objected as incompetent immaterial, irrelevant, and has already been answered, witness having testified as to the value of the land.

A. It has been quite a number of years since that was the case.

J. C. FLETCHER.

I, Fulton Jack, a Notary Public, within and for the County of Gage and State of Nebraska, do hereby certify that the above named George E. Hawkins, Edward B. Sherman, J. S. Grable and J. C. Fletcher, witnesses, whose names are subscribed to the foregoing depositions, were by me first duly sworn to testify the truth, the whole truth and nothing but the truth, that the foregoing depositions by them respectively subscribed were taken down in shorthand according to
301 stipulation entered into, by the solicitors for the complainant and respondent and extended in typewritten copy according to said stipulation and were by said witnesses respectively subscribed in my presence and were taken at the time and place specified in the notice hereto attached, and the

taking of said depositions was commenced on the eight- day of February 1895, and was closed on said day.

Witness my hand and Notarial seal this Eighth day of February, 1895.

FULTON JACK, Notary Public.

[Seal.]

My commission expires November 26th. 1900.

Costs and fees charged to respondent Cheney.

Writing deposition at ten cents per hundred words....	$6.25
Swearing four witnesses five cents each	.20
Calling witnesses	.50
Postage	.20
Four witnesses $1.10 each	4.40
Notarial seal and signature	.15
Total	$11.70

In the Circuit Court of the United States for the District of Nebraska.

DEPOSITIONS DE BENE ESSE.

John S. Bilby, Plaintiff,
vs.
Prentiss D. Cheney, Defendant.

Please take notice that the deposition de bene esse of E. B. Sherman, George E. Hawkins, J. C. Fletcher, J. S. Grable, W. W. Buchanan and I. J. Frantz, Co. Treasurer, will be taken to be read in evidence at the trial of said cause on the
302 part of respondent therein, before competent authority at the office of Alfred Hazlett, Attorney at Law in Beatrice in the County of Gage and State of Nebraska, commencing on the Eighth day of February 1895, at the hour of nine o'clock in the forenoon of said day, with authority to adjourn from day to day till all such depositions shall have been completed at which time and place you are hereby notified to be present and put interrogatories to said witnesses if you shall think fit. The reason for taking the deposition is that said witnesses live at, a greater distance than one hundred miles from Omaha, Nebraska, the place of trial of this action.

Dated at Lincoln, this 4th. day of February, 1895.

CHAS. E. MAGOON,
Solicitor for respondent.

To R. W. Sabin, Esq.,
Solicitor for complainant.

I hereby accept service [—] the above and service of the above notice by receiving a copy thereof on this 5th. day of February 1895, is admitted.

ROBT. W. SABIN,
Solicitor for complainant.

Upon the back of said Depositions appear indorsements in words and figures following, to-wit:—No. 270 P. In the Circuit Court of the United States for the District of Ne-
303 braska. John S. Bilby, Complainant, vs. Prentiss D. Cheney, Respondent. Depositions. Taken February 8th. 1895. Rec'd & filed Feb. 16—95, & opened by order of Court Apr. 1, 1895. E. D. Frank, Clerk.

304 Thereupon afterwards, to-wit: on the 2nd day of March, 1895, Depositions on behalf of Respondent were filed in said case, which said Depositions are in the words and figures following, to-wit:

In the Circuit Court of the United States, District of Nebraska.

STIPULATION.

John S. Bilby, Complainant,

vs.

Prentiss D. Cheney, Respondent.

It is hereby stipulated and agreed by and between the complainant, John S. Bilby, and the respondent, Prentiss D. Cheney, that the testimony of W. E. Reed may be taken in the case of John S. Bilby, complainant, vs. Prentiss D. Cheney, respondent, now pending in the Circuit Court of the United States for the District of Nebraska, on the 19th day of February, 1895, at the office of Charles E. Magoon, in the City of Lincoln, Lancaster County, Nebraska, without the issuance or service of notice of the taking of said deposition, the same being hereby expressly waived, and said deposition may be offered and read in evidence in said cause and Court the same as if due notice of the taking of the same had been had and made herein.

ROB'T. W. SABIN,
Attorney for Complainant.

CHAS. E. MAGOON,
Attorney for Respondent.

In the Circuit Court of the United States, District of Nebraska.

State of Nebraska,
Lancaster County—ss.

305 DEPOSITIONS.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, Respondent.

Deposition of witness taken before me, a notary public, duly commissioned and qualified for and residing in the County of Lancaster and State of Nebraska, on the 19th day of February, in the year 1895, between the hours of ....A. M. and ....P. M. at the office of Charles E. Magoon, in the city of Lincoln, in said County, pursuant to the annexed stipulation, to be read in evidence on behalf of the respondent Cheney, in an action pending in the Circuit Court of the United States, District of Nebraska, in which John S. Bilby is complainant and Prentiss D. Cheney is respondent.

W. E. Reed of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposes and says as follows, viz:

For Complainant, R. W. Sabin.

Appearances:

For Respondent Cheney, Charles E. Magoon.

Q. State your name?
A. W. E. Reed.
Q. Your age and place of residence?
A. Age 28, residence, Madison, Madison County, Nebraska.
Q. What is your profession?
A. Attorney at law.
Q. How long have you lived in the State of Nebraska?
A. Eight years and a half—a little over eight years.
Q. What was your profession in and during the month of May, 1891?
A. The same as at present.
Q. Were you a member of any firm at that time, and, if so, will you please state the name of the firm?
306 A. I was a member of the firm of Allen, Robinson & Reed.
Q. Where was this firm located? That is to say, where was its office at that time?
A. In Madison, Madison County, Nebraska.
Q. Of whom was the firm composed?
A. William V. Allen, John S. Robinson and Willis E. Reed.

Q. Handing you letter marked respondent's exhibit A, I will ask you if that document is written on one of the letter heads of your firm?

A. It is.

Q. I will ask you if you are familiar with the signature of your firm as made by the various members thereof?

A. I am, and was on the 13th day of May, 1891.

Q. Whose signature is that attached to the type-written portion of this letter?

A. It is the signature of Allen, Robinson & Reed, and written by William V. Allen, who was at that time the senior member of the firm.

Q. Do you know John A. Wisherd?

A. I do.

Q. You may state whether or not, in the month of May, 1891, and for the entire year of 1891, the firm of Allen, Robinson & Reed had any employment with or for John A. Wisherd, and, if so, state the character of such employment?

Complainant objects to this question as incompetent, irrelevant and immaterial.

A. During the time referred to in your interrogatory, we were employed in a general way by Mr. John A. Wisherd.

Q. Do you mean to say that your retainer was general?

A. In Madison County it was.

Q. You may state if you received a financial consideration in the way of a retainer from Mr. John A. Wisherd?

A. I do.

307 Q. State in such terms as you can, the character of your employment, and the employment of your firm to Mr. John A. Wisherd, or with him?

A. We were retained in such a manner that we could not take a case against him, and were to receive a compensation for any work which we did for him in Madison County, according to the work done, and when we went outside of Madison County to do any work for him, that was to be done by special agreement and at a fixed price per day.

Q. Was this letter which you have identified, and which appears as respondent Cheney's exhibit A, written pursuant to such employment?

A. I know nothing of my own knowledge with reference to the writing of the letter, it having been written, I presume, by Mr. Allen, and I was not at home, at the home office on the day it was written, and I know nothing of my own knowledge, [personnaly] about the letter.

Q. Will you allow a copy of this letter to be attached to your deposition and made a part thereof?

A. I have no objection.

Q. Had you been paid a retainer for the year 1891, by Mr. John A. Wisherd?

A. We had. Whether it was received from John A. Wisherd in person, or through some one else for him, I cannot state.

Q. From what time to what time did that retainer include?

A. From sometime in April—the fore part of April, until the following April.

Q. That would be from the fore part of April, 1891, to the fore part of April, 1892?

A. Yes, sir, the exact date I am not able to state. Regarding this letter, I desire to further state, that all the writing on the letter underneath the line upon which the firm name of Allen, Robinson & Reed is written, has been written by persons unknown to me, and the handwriting is strange to me.

308 Respondent Cheney offers in evidence so much of said letter as is identified by witness, being the letter head, the address, the type-written portion of the letter, and the signature of the firm of Allen, Robinson & Reed, signed thereto.

Complainant objects to this offer as incompetent, irrelevant and immaterial, and because it is not shown that the firm of Allen, Robinson & Reed had any authority to write said letter.

Said letter is hereto attached, marked respondent's exhibit A, and made a part of this deposition.

Cross-Examination.

By R. W. Sabin:

Q. Mr Reed, did you ever receive any retainer from Mr. Wisherd in regard to this particular matter,—your firm?

A. Not to my personal knowledge. The only manner in which we received any retainer, is in the manner which I have before stated.

Q. Did you ever have any thing to do with this controversy between Mr. Cheney and Mr. Wisherd,—your firm?

A. I am unable to state as to what any other [mambers] of the firm might have had, personally, myself, I have not, and know nothing of my own knowledge.

Q. Of either of the other members of your firm having anything to do with it?

A. No, I do not know anything about that. All I know is what is in that letter.

Q. Did not your retainer consist of an agreement with Mr. Wisherd that you were to take any cases against him, and in

case there was any litigation came up in that County in which he was interested, that you considered yourselves retained by him and to be paid by him for the services rendered?

A. Yes, and in addition thereto, that any work outside was to be paid by a compensation per day for our work.

309 Q. That is providing—

A. Providing we went outside of Madison County.

Q. And if you went outside of that County, it was to be by special contract at the time?

A. Yes, sir.

Q. Did you receive a retaining fee to start on, or were you just to receive pay for you- work?

A. We received a general retaining fee to commence with.

Q. But that applied to your County, and not to take any cases against him anywhere else, I suppose; is that it?

A. Just as I have stated before.

Q. Is that it in substance?

A. That is substantially true. We were not to take any cases in Madison County against John A. Wisherd, in which it appeared he was interested and when he had any litigation in Madison County we were retained and were to charge such a fee as was just and reasonable for the work, the work which we did for him, or if we went outside of the County for him we were to receive a certain compensation per day, and expenses. I don't think I have said anything about expenses before, but we were to receive our cash outlay and a certain compensation.

Q. You know nothing of these transactions of your own knowledge?

A. No, sir, with reference to the letter.

Q. Do you know anything about where Mr. Wisherd was at this time—the date of this letter?

A. I do not.

Q. You say that you were not at home the day the letter was written? Do you know where you were?

A. By referring to our books, I would say, I was in Battle Creek on that day, and to the best of my recollection. That is about 17 miles from Madison.

310-311 Q. When were you retained by Mr. Wisherd?

A. Some time in the month of April, the exact date I am unable to state, in the year, 1891.

Q. Did you keep any memorandum of that?

A. Yes, sir, we did in our books.

Q. Was it for that year only?

A. For that year.

Q. Was there some litigation up in that County for him?

A. Yes. I will state further with reference to that other question about it being for that year only, and for succeeding

years, when the retainer would run out, it was his duty to specify in regard to retainers, and to continue, and he did specify for another year, which made it a retainer ending sometime in April, 1893.

Q. I will ask you, Mr. Reed, if there was not some litigation in your County there during the year 1891, in which you represented Mr. Wisherd in the Courts?

A. There was.

Q. And was that the reason you received this retainer?

A. As to that I could not say.

Q. Were you present at the time the contract of retainer was made?

A. Part of the time.

Q. Who was it made with?

A. Partly with Mr. Allen and partly with myself.

Complainant offers [—] evidence all writing on the letter referred to in this deposition, and on the sheet on which is found the letter introduced by respondent Cheney, which writing was not introduced by the respondent.

The said offer is found on the same sheet as respondent's exhibit A, hereto attached and made a part hereof, and is marked complainant's exhibit A. The same being signed by Russell & Holmes.

W. E. REED.

312 RESPONDENT'S EXHIBIT A.

E. H.

William V. Allen. John S. Robinson. Willis E. Reed.

..... Allen, Robinson & Reed,

vs. Law Offices,

..... Stuart's Bank Building.

Madison, Nebraska, May 13th, 189 .

Russell & Holmes.

Gentlemen : We enclose you for the use and benefit of P. D. Cheney, 16 notes made to him by John A. Wisherd, which was by mistake taken by Mr. Wisherd's father from the express office at Clarkson, in this State, yesterday. Mr. Cheney has been fully informed of their return to your office, where they appear to be payable. Please acknowledge their receipt, and oblige,

Truly,

ALLEN, ROBINSON & REED.

COMPLAINANT'S EXHIBIT "A."

May 19, 1891.

These notes are sent to us without any authority or request upon our part. We simply hold them for the owner, who ever he may be.

RUSSELL & HOLMES.

Certificate.

State of Nebraska,
Lancaster County—ss.

I, E. J. Hedges, a notary public, duly.....and qualified, do hereby certify that W. E. Reed, was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, as above set forth, was reduced to writing by me and in the presence of the witness, and was respectively subscribed by the said witness in my presence and was taken at the time and place in the annexed stipulation specified, that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit; and said deposition was commenced at the time in said stipulation specified; and that the place of residence of said witness is more than one
313 hundred miles than the place where said cause of action is to be tried.

In testimony whereof, I have hereunto set my hand and official seal at Lincoln, Nebraska, this 22nd day of February, 1895.

[Seal] E. J. HEDGES,
Notary Public.

My Commisson expires March 28, 1899.

Costs.

Swearing one witness	.10
Twenty-four hundred words	4.80
One certificate	.25
Postage	.10
Fees of W. E. Reed, as witness	1.50
Total	$6.75

Paid by respondent, P. D. Cheney.

[Seal] E. J. HEDGES,
Notary Public.

My Commission expires, March 28, 1899.

Upon the back of said Deposition appear endorsements in the words and figures following, to-wit: No. 270 P. Rec'd & filed, Mch. 2, 1895, [&] opened by order of Court, April 1 '95. Elmer D. Frank, Clerk.

314 Thereupon afterwards, to-wit: on the 4th day of March, 1895, Depositions on behalf of Respondent were filed in said case, which said Depositions are in the words and figures following, to-wit:

DEPOSITIONS DE BENE ESSE.

United States of America,
State of Illinois, County of Jersey—ss.

Be it remembered, that on this 26th day of February, A. D. 1895, I, Evelyn L. Reynolds, a Notary Public in and for said County and State aforesaid, appointed duly commissioned and qualified, and by the laws of the United States authorized and empowered to take depositions in causes pending in the Circuit Court of the United States, did call and cause to be and personally appear before me at the office of F. Ferns, in the County of Jersey, in the State of Illinois, Prentiss D. Cheney and Andrew W. Cross, to testify and the truth to say on the part and behalf of the Respondent, in a certain suit or matter of controversy now depending and undetermined in the Circuit Court of the United States for the District of Nebraska, at Omaha, in the State of Nebraska, wherein John S. Bilby is plaintiff, and Prentiss D. Cheney, et al, is defendant.

And the said Prentiss D. Cheney being about the age of 58 years, and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Prentiss D. Cheney and he did thereupon depose, testify and say as follows, viz:

Prentiss D. Cheney, being first duly sworn on oath, testified as follows:

Examined

By Charles Magoon.

Q. State your name, age and place of residence?
A. Prentiss D. Cheney; 58 years; Jerseyville, Illinois.
Q. Do you know the complainant, John S. Bilby?
315 A. I do not; never saw him; never had a letter; never had any business with him.
Q. Do you know one John A. Wisherd?
A. I do.
Q. Did you have any business transaction with him in the year 1881?

A. I did. The transaction took place by means of correspondence through the mail; I did not personally see Wisherd at the time.

Q. By whom was the communication conducted?

A. On my behalf it was conducted by Pinero and Selby, a firm of real estate agents of Tecumseh, Johnson County, Nebraska.

Q. Was the transaction reduced to writing?

A. It was.

Q. Handing you Exhibit "A", I will ask you if you know whose signature is attached thereto?

A. I did not see Wisherd write it.

Q. Do you know whose signature it is?

A. I believe it is John A. Wisherd's, although I did not see him sign it.

Q. State what the document is referred to as Exhibit "A"?

(Complainant objects on the ground that the document is the best evidence.)

A. It is the contract between myself and John A. Wisherd, made on May 2nd, 1881, in reference to 2215 acres and 21/100 in Gage County, Nebraska.

Q. You may state the fact as to whether or not this agreement was in duplicate?

A. It was in duplicate; I held one part and Wisherd held the other part.

Q. Which one did you hold?

A. I held the part that is now produced.

Q. Is this the contract involved in this controversy?

A. It is.

316 Q. In whose handwriting is the written part of this instrument aside from the signatures, that is, in whose handwriting is the body of the instrument?

A. Blanks were filled by himself; it was acknowledged before a notary public in Tecumseh, Nebraska, E. A. Pinero.

(Respondent Cheney offers in evidence the document identified as "Exhibit A", to the introduction of which document the complainant objects on the ground that it is incompetent, immaterial and irrelevant.)

Q. How much, if anything, was paid on this contract at the time it was entered into?

A. $412.55.

Q. Were the notes referred to in said contract executed?

A. They were.

Q. How many, and which ones of said notes, if any, have been paid?

A. The two notes first falling due; that is, in 1882 and 1883, were paid.

Q. State the amounts that were paid?

A. The note due in 1882 was $905.63; note due in 1883 was for the sum of $905.63.

Q. Where were the said notes paid?

A. At the banking house of Russell & Holmes, of Tecumseh, Nebraska.

Q. By whom were the notes forwarded to the banking house of Russell & Holmes, at Tecumseh, Nebraska?

A. The first note was forwarded by my-self to Russell & Holmes; the second note, the one due in 1883, I deposited with the First National Bank of Jerseyville, and they forwarded it to Russell and Holmes for collection. It was immediately paid, and I received credit for the amount of the note.

Q. Whereabouts?

A. Here in the First National Bank in this town.

317 Q. How about the first note?

A. The first note I sent to Russell & Holmes myself; they collected it and credited my account with the amount.

Q. With them?

A. In their bank.

Q. Were the notes falling due in 1884 paid?

A. I wish to add to my former answer that I deposited this note in the First National Bank about two weeks before it was due, about the middle of April, 1883.

Q. For what purpose was it deposited?

A. For collection.

Q. Were the two notes due in 1884 paid?

A. They were not paid.

Q. You may state when and in what manner said notes were presented for payment at the banking house of Russell & Holmes, of Tecumseh, Nebraska?

A. I did not personally present the notes; I was in Atchison, Nebraska; I sent my brother, Gilead P. Cheney, with the notes there from Atchison to Tecumseh, a distance of about 100 miles on the 5th day of May, 1884, for the purpose of collecting the amount due on the notes.

Q. You may state why you forwarded these notes by your brother—why they were sent by an individual.

(Complainant objects to the question as incompetent, immaterial and irrelevant.)

A. I sent them by special messenger for the purpose of getting the actual cash for the notes. A panic was then at large in the country; I wanted the money; there was a panic

then in New York; the firm of Donnel, Lewson & Simpson failed about that time; there was a financial panic in the country at that time.

Q. When your messenger returned, you may state what was the result of his journey?

318 (Complainant objects to the question as incompetent, immaterial and irrelevant.)

A. My brother returned next day and brought the notes back to me and stated he could not get the money for them; no money there to pay them.

(Complainant moves to strike out that part of the answer in which witness states what his brother told him, as incompetent, immaterial and irrelevant, and hearsay.)

Q. State whether or not you received back the notes?

A. I did.

Q. State what further you did with reference to the payment of these notes at that date?

A. I wrote to Russell & Holmes concerning it.

Q. Have you either the original or a copy of the letter which you wrote at that time to Russell & Holmes?

A. I have not.

Q. Did you make a copy of said letter?

A. I don't know.

Q. Have you ever made search for the original of said letter among the papers of the firm of Russell & Holmes?

A. I have and was unable to find it.

Q. Has this letter ever been in your possession or under your control at any time since you forwarded it to them, and is it now in your possession or under your control?

A. I have never seen the letter since I mailed it to Russell & Holmes. It is not in my possession nor under my control. I do not know where it is; I don't know any way to find it.

Q. You may state the contents of said letter?

(Complainant objects to witness stating contents of said letter on the ground that it is incompetent, immaterial and irrelevant; that the respondent was merely corresponding with his own agents.)

319 A. I wrote the letter to Russell & Holmes for the purpose of finding out the whereabouts of Wisherd with the view of having him pay these two notes that were due on the 5th of May, 1884.

Q. State the contents of the letter, as near as you can, and your object in writing it?

(Complainant objects to question as incompetent, immaterial and irrelevant.)

A. The contents of the letter were inquiring where he was and if I could get the money for the notes.

Q. Did you receive an answer to that letter?

A. I did.

Q. Have you the original of that answer?

A. I have not the original; I have a copy of it.

Q. What became of the original?

A. The original was used in the ejectment suit between myself and John A. Wisherd; it was deposited with the clerk for the purpose of forming a part of the bill of exceptions, and it became lost in some manner and has never been found since. The entire bill of exceptions was lost so the clerk of the court told me; I was in his office and we jointly made search for it and was unable to find it at the office of the U. S. Circuit Clerk of Omaha. The original letter is in that bill of exceptions.

Q. Have you a copy of that letter?

A. I have a copy of it.

Q. Please produce it.

A. This is the copy of the letter.

Q. Handing you "Exhibit B", I will ask you to state what it is?

A. It is a copy of a letter dated May 28th, 1884, written by Russell & Holmes of Tecumseh, Nebraska, to myself, at Atchison, Kansas.

Q. Is it a true copy?

A. It is a true copy.

320 Q. Is it a copy of the letter referred to in your previous answer as having been received from Russell & Holmes in response to your letter of inquiry?

A. It is.

Q. Is it a true and correct copy?

A. It is.

(Copy of letter marked "Exhibit B," offered in evidence by respondent Cheney, to the introduction of which complainant objects as incompetent, immaterial and irrelevant.)

Q. Did you answer this letter?

A. I did.

Q. On what date?

A. I believe it was two days afterwards, very soon afterwards.

Q. Have you a copy of the letter which at that time [—] wrote to Russell & Holmes?

A. I have seen a copy of it, but I cannot lay my hand on it this minute.

Q. Calling your attention to letter attached to deposition of Charles A. Holmes, taken on behalf of the complainant,

which letter is identified as complainant's "Exhibit A," attached to said Holmes' deposition, I will ask you if that is a true and correct copy of the letter which you wrote at that time?

A. It is. I was present when Mr. Holmes gave the deposition, and when he introduced the letter.

Q. Did you afterwards write a letter to John A. Wisherd?

A. I did.

Q. Have you a copy of that letter?

A. I have.

Q. What did you do with the original after you had written it?

A. I sent it by mail to John A. Wisherd.

321 Q. At what address?

A. I cannot state; the letter did not state what address was used.

Q. Did it have a return card on the envelope?

A. It is impossible for me to state about that.

Q. Did you ever receive said letter back? Was the original letter ever returned to you?

A. No, sir, Wisherd replied to the letter.

Q. When did you next see the original of that letter?

A. At the trial of the ejectment suit between Wisherd and myself.

Q. Have you ever had this letter under your control since that time, or do you know as to its present whereabouts?

A. Never has been in my control; I don't know where it is or where it has been.

Q. State what Exhibit "C" is?

A. It is a letter written by me to John A. Wisherd, dated June 16, 1884.

Q. Is it the original letter or a copy?

A. It is a copy.

Q. Is it a true copy of said letter?

A. It is a true copy.

(Respondent Cheney offers in evidence said copy of said letter, marked Exhibit "C", to the introduction of which the complainant objects as incompetent, immaterial and irrelevant.)

Q. Did you receive [and] answer to letter identified as Exhibit "C"?

A. I did.

Q. At about what time?

A. First few days of July.

Q. What year?

A. 1884. The letter was written from Omaha.

Q. By whom was the letter purported to be written?

A. By John A. Wisherd.

322 Q. Have you the original of that letter?
A. I have not.
Q. What became of it?
A. It was used in the ejectment suit I spoke of; was deposited with the clerk to form a part of the bill of exceptions, which was lost and has never been seen or heard of by me since.
Q. Have you a copy of it?
A. No, sir.
Q. Calling your attention to Exhibit "Z," attached to deposition of John A. Wisherd, taken on behalf of the said complainant, Bilby, I will ask you if that is a copy of the letter which you received from John A. Wisherd, from Omaha, under date of July 9, 1884?
A. It is a copy.
Q. Did you write him another letter on receipt of said letter of July 9th, 1884?
A. I did.
Q. Have you a copy of that letter?
A. I have.
Q. What became of the original?
A. The original was used in the ejectment suit that I have previously spoken of. It was deposited with the clerk for the purpose of forming a part of the bill of exceptions, which has been lost, mislaid, and not found since; I don't know where it is or where it has been.
Q. Handing you Exhibit "D", I will ask you if said Exhibit is a true and correct copy of your letter to Wisherd under date of July 14, 1884?
A. It is a true copy of the letter I wrote to John A. Wisherd at Dawson, Missouri.

(Respondent Cheney offers said copy of said letter, marked Exhibit "D," in evidence, to which introduction the complainant objects on the ground that it is incompetent, immaterial and irrelevant.)

323 Q. You may state what, if anything, was enclosed in said letter marked Exhibit "D"?
A. The letter contained sixteen unpaid notes, all dated May 2, 1881, given to me by Wisherd as a part of the land contract of same date, heretofore identified and referred to in this deposition as Exhibit "A."
Q. Were these all of the notes then remaining unpaid involved in the transaction evidenced by Exhibit "A" between you and Wisherd?
A. They are the same notes.
Q. When did you next see these notes?

A. I never saw the notes afterwards until the trial of the ejectment suit between myself and Wisherd, heretofore spoken of.

Q. Please give the date that you sent these notes and this letter to Wisherd, and also the date when you next saw them?

A. I sent them to Wisherd July 14, 1884; I next saw them at the trial of the ejectment suit I have referred to; I cannot give the date of that trial.

Q. In whose possession were they when you saw them at the trial?

A. In the possession of Wisherd and his attorneys.

Q. Who were his attorneys?

A. Mr. Sabin, Judge Lake was another. Just who had them in his hands, I am not right sure about it. They were in the possession of Wisherd and his attorneys.

Q. What did they do with them?

A. Threw them down on the table and said I could have them.

Q. During the period of time between July 14, 1884, and the time when Wisherd's attorneys threw these notes down on the table during the ejectment trial, what, if anything, did you know as to the whereabouts of said notes?

A. I did not know anything; I do not know where they were.

324 Q. Did you ever have them in your possession, at any time, during the period referred to?

A. I did not; never saw them; never had them in my possession; never under my control.

Q. Calling you- attention to a paper marked Exhibit "E", I will ask you to state what it is?

A. It is a letter written by Russell & Holmes to myself, dated May 18, 1885.

Q. In whose handwriting is this letter?

A. In the handwriting of Charles A. Holmes.

Q. In whose handwriting is the signature?

A. Charles A. Holmes, member of the firm.

(Respondent Cheney offers in evidence Exhibit "E".)

Q. How long did these notes remain under your custody after their being delivered to you at the time of the ejectment trial at Lincoln, Nebraska?

A. I tried to return them to Wisherd; sent them to him four different times in registered letters and they were returned to me on each occasion; they were returned to me and I had them in my custody until May 6, 1891.

Q. During that period of time, what, if any, efforts did you make to return them to John A. Wisherd?

A. I sent them in registered letters directed to John A. Wisherd at Adams, Nebraska, once at Lincoln, Nebraska, once

at Dawson, Mo., and finally at Quitman, Mo. They were not taken out of the post-office; they were returned to me.

Q. What, if any, efforts did you make to find the whereabouts of John A. Wisherd during this period of time?

A. I tried to find out, I think, principally from Pinero and Chapman, or Mr. Chapman, of Tecumseh, Nebraska.

325 Mr. Chapman was acquainted with Wisherd; he gave me these different post-office addresses as being the most probable places to reach him.

Q. Have you any of the letters in which these notes were enclosed which you forwarded to Wisherd, and which were returned to you?

A. I have two of them.

Q. Have you the envelopes in which any of these letters were sent?

A. I have one enclosing letter of December 30, 1890.

Q. In whose handwriting are the letters marked Exhibits "F" and "G" and whose signatures are attached thereto?

A. Both of the letters are in my handwriting; both are signed by myself.

Q. In whose handwriting is the address on the envelope marked Exhibit "H"?

A. In my handwriting, written by myself.

(Respondent Cheney offers in evidence Exhibits "F," "G" and "H," to which introduction the complainant objects as incompetent, immaterial and irrelevant.)

Q. State what, if any, loss, inconvenience or damage the failure to pay the notes due in 1884, was to you?

(Complainant objects to the question as incompetent, immaterial and irrelevant.)

A. It was a very great inconvenience. Difficult for me to tell what the precise loss was.

Q. State what occasioned the inconvenience?

A. The great scarcity of money at that time, the great inconvenience of not being able to get hold of it when it was due me.

Q. What occasioned the scarcity of money at that time?

A. The financial panic in New York and throughout the country at large.

Q. You may state what you did relative to the notes

326 and the matter in controversy on May 17, 1890?

A. I was then in Tecumseh, Nebraska; I personally left with the Tecumseh National Bank, successors to Russell & Holmes, fourteen past due notes against said Wisherd and authorized the Bank to receive the amount of the notes and interest from Wisherd. I also wrote Wisherd a letter, dated

May 17, 1890, notifying him I had left the notes at the Bank and that he could pay the full amount within a reasonable time.

Q. Were the instructions to the banking house, known as the Tecumseh National Bank, written?

A. They were.

Q. Have [—] the original of such written instructions?

A. I have not the original.

Q. Have you a copy of the original?

A. I have a letter press copy made in the letter book of the bank on the date mentioned.

Q. Is it a true and correct copy?

A. Yes, sir, it is.

Q. Has the original been in your possession or under your control?

A. It has not been in my possession or under my control.

(Respondent offers in evidence Exhibit "I.")

Q. Have you the original of the letter which you testified you sent to John A. Wisherd?

A. I have not the original.

Q. Have you a true and correct copy of said letter?

A. I have a copy of it.

Q. Is it a true and correct copy?

A. It is a true and correct copy.

Q. Handing witness Exhibit "J," I will ask you to state what it is?

A. It is a copy of a letter written by myself to John A. Wisherd, at Adams, Neb. dated May 17, 1890.

327 (Respondent Cheney offers said letter marked Exhibit "J" in evidence, to which introduction the complainant objects as incompetent, immaterial and irrelevant.)

Q. What, if any, communications did you receive from any source in [responce] to said letter marked Exhibit "J"?

A. I received from C. A. Holmes, president of the Tecumseh National Bank, a letter, dated May 29, 1890.

Q. Handing witness Exhibit "K," I ask you what Exhibit "K" is?

A. It is a letter written to me by Charles A. Holmes, president of the Tecumseh National Bank, dated May 29, 1890, in the handwriting of Charles A. Holmes.

Q. Is this the original letter referred to in your previous answer?

A. It is the original letter.

(Respondent Cheney offers in evidence Exhibit "K," to the introduction of which the complainant objects as incompetent, immaterial and irrelevant.)

Q. How long did these notes remain in the Tecumseh National Bank, successors to Russell & Holmes, under the instructions given to the Bank by you on May 17, 1890, and appearing on record as Exhibit "I"?

A. Well, for some weeks. I am not able to give the date, but after Wisherd refused to pay them the Bank returned the notes to me.

(Complainant moves to strike out that part of the answer in which witness states that Wisherd refused to pay, as the witness has not shown that he has any knowledge of what Wisherd did.)

Q. What did you do with these notes on May 5, 1891?

A. On that day I was in Tecumseh, Nebraska. I personally applied to the Bank, the Tecumseh National Bank, the successors to Russell & Holmes, and presented the notes and demanded payment.

Q. Were the notes paid?

A. The notes were not paid. No money there to pay them with.

328 Q. You may state what, if any, preparation you had made towards closing up the contract and transaction involved herein?

(Complainant objects to the question as incompetent, immaterial and irrelevant.)

A. I went to Tecumseh for the express purpose of collecting the amount due on the notes, and I had with me a warranty deed to Wisherd for the lands, ready to be delivered upon payment of the amount due me.

Q. Have you the deed which you had with you at that time?

A. I have.

Q. Handing you paper identified as exhibit "L", I ask you to state if that is the deed you had with you at the time of you- visit at Tecumseh and your call at the Tecumseh National Bank on May 5th, 1891?

(Complainant objects to the question as incompetent, immaterial and irrelevant and leading.)

A. This is the original warranty deed executed by myself and wife on April 29, 1891, in favor of John A. Wisherd, as grantee, for the land in Gage County, specified and mentioned in the contract heretofore referred to.

Q. Will you allow a copy of said deed to be attached and made a part of your deposition and produce the original upon the trial and hearing of this cause?

A. Certainly, I will.

(Respondent Cheney offers in evidence Deed marked Exhibit "L", to which introduction the complainant objects as incompetent, immaterial and irrelevant.)

Q. Upon making you- demands of Russell & Holmes and of the Tecumseh National bank, state what, if any, response was made you?

(Complainant objects to foregoing question as incompetent, immaterial and irrelevant.)

A. Mr. Holmes informed me they had no money
329 there with which to pay these notes. He also informed me that Mr. Callahan, cashier of the First National Bank of Lincoln, had been there on May 2nd, with $19,512.00 which he offered to pay for the notes and for a deed. He also gave me a copy of a written refusal that he had made to Callahan to accept the tender of $19,512.00 for John A. Wisherd to pay the notes given to Prentiss D. Cheney, for the reason that he had not the notes in his possession, nor the deed to the premises called for.

Q. Handing you Exhibit "M", I will ask you to state if that is the paper which Mr. Holmes gave to you at that time and about which you have testified?

A. This is the paper given to me by Mr. Holmes.

(Respondent Cheney offers paper identified and marked Exhibit "M" in evidence.)

Q. State whether or not Mr. Holmes, as president of the Bank, made you a written statement relative to said matter at the same time and date?

A. Mr. Holmes had written a letter to me which was in the mail at the time, and I actually received this letter after I got back home to Jerseyville. Mr. Holmes described the transaction to me and read to me from his letter book what he had written concerning it.

Q. Handing you Exhibit "N", I will ask you to state if said Exhibit is the letter about which you have testified?

A. It is the original letter.

(Respondent Cheney offers said letter marked Exhibit "N" in evidence.)

Q. Where did you go from Tecumseh on this trip?

A. I went to Lincoln, Neb.

Q. When did you arrive at Lincoln, Nebraska?

A. I went up on the train the next morning, which was May 6th, and reached Lincoln, along about noon that day.

Q. How far is it from Tecumseh to Lincoln?

330 A. It is about fifty miles within a mile or two or three of it.

Q. What did you do at Lincoln?

A. I went to see the people of the First National Bank of Lincoln.

Q. Whom did you see?

A. I saw cashier Callahan and president McFarland.

Q. Did you have any conversation with them relative to the contract involved herein and the closing up of that transaction evidenced by such contract?

A. I did.

Q. State what it was?

A. I asked both of the gentlemen if I could get the money for the land and close the matter up; that I had a deed ready to be delivered.

Q. What did they say?

A. They said that they had no interest in the matter whatever; they were acting for Wisherd; all they had was a draft drawn by Bilby on himself, payable at Quitman, Mo, and marked "good", and they told me that the draft was good for the money.

Q. What did they tell you, you could have?

A. They told me I could have this draft for the notes and a deed to the land executed to Wisherd. I told them the amount of the draft was Five or Six Thousand Dollars less than the amount due me on the notes, and therefore I refused to take the draft.

Q. You may state whether or not they produced, made proffer of, or tendered to you any money on this transaction?

A. They did not. They did not show any money, or bring any money. No money was in sight.

Q. What, if anything, was said about money?

A. They said this draft was good for the money, and that if I would receive it I could have it by executing a deed and by delivering the notes. They said Bilby was a responsible man.

331 Q. What did you do on that day in further continuation of this matter?

A. So soon as I found out I could not get paid for the notes I sent them to John A. Wisherd by express, at Clarkson, Neb.

Q. On what date and from what place did you send these notes?

A. I sent them on May 6th, 1891, sent them from Lincoln, Neb.

Q. How many notes did you send?

A. Sent him sixteen.

Q. You may state whether or not these were all of the notes which remained unpaid involved in this transaction?

A. They were.

Q. When did you next see these notes?

A. I never saw the notes again until November, 1894, during the proceedings in taking the deposition of Charles A. Holmes, on behalf of the complainant, in Tecumseh, Nebraska, when the notes were produced by Mr. Holmes. The notes were found in the vault of the Tecumseh National Bank, who were the successors to Russell & Holmes. I was personally present with Holmes and Pierce, the cashier of the said Bank, when we found the notes.

Q. Was there a letter from yourself to Wisherd enclosed in the express package containing the notes which you forwarded to Wisherd at Clarkson, Neb?

A. There was a letter written by myself to John a Wisherd.

Q. Have you the original of that letter?

A. I have not.

Q. Have you a copy of it?

A. I have not.

Q. Can you state the contents of said letter?

A. I think I can.

Q. State the contents of said letter.

332 (Complainant objects to witness stating the contents of said letter on the ground that it is incompetent, immaterial and irrelevant.)

A. The letter was written by myself under instructions from my attorney O. P. Mason. The letter stated that the sixteen notes were returned to him in consequence of his default. I think it also contained a demand for the possession of the land and declaring the contract forfeited.

Q. Did you receive any response in reply to said letter?

A. I did not receive anything from Wisherd direct, but I did receive a letter dated May 13, 1891, written to me by Allen, Robinson & Reed, a firm of lawyers at Madison, Nebraska.

Q. Have you the letter written by Allen, Robinson & Reed?

A. I have.

Q. Handing you Exhibit "O", I ask you if Exhibit "O" is the original of the letter which you have testified to?

A. It is the original letter which I received by mail from Allen, Robinson & Reed.

(Respondent Cheney offers Exhibit "O" in evidence, to the introduction of which the complainant objects as incompetent, immaterial and irrelevant.)

Q. You may state what, if any, knowledge you possessed, or what, if any, information you had received prior to the commencement of this suit relative to the alleged transfer of

the contract, evidenced by said Exhibit "A", to John S. Bilby, the complainant herein?

A. I never knew of any transfer from John A. Wisherd to John S. Bilby until I commenced the ejectment suit against John A. Wisherd to recover possession of this same land.

Q. When?

A. I cannot tell you the date.

Q. Can you fix the date that you commenced the suit, the ejectment suit?

333 A. I do not know.

Q. Was it after the time when the notes were forwarded by express to John A. Wisherd at Clarkson, Neb.?

A. It was—the ejectment suit now pending.

Q. You may state the fact as to whether or not you have ever consented in any way to the transfer of said contract to John S. Bilby?

A. I have never consented to the transfer; never been asked to consent to it; never been notified concerning it, or asked about [in] in any way, shape, manner or form.

Q. Do you now consent to such transfer, or recognize such transfer?

(Complainant objects to question as incompetent, immaterial and irrelevant.)

A. I do not consent to the transfer from Wisherd to Bilby. I object to it, being a violation of the contract between Wisherd and myself.

Q. You may state what, if any, knowledge or information you possessed prior to the commencement of this suit regarding the transfer of said contract, evidenced by Exhibit "A", to the First National Bank of Lincoln, Nebraska?

A. Never heard of any transfer to the First National Bank of Lincoln, Neb. until it was developed in the course of the proceedings in this suit when depositions were taken in Lincoln.

Q. [Q.] You may state whether you have consented to the transfer of this contract between yourself and Wisherd, relative to this land, to the said First National Bank of Lincoln, Nebraska?

(Question objected to by complainant on the ground that it is incompetent, immaterial and irrelevant.)

A. I have never consented to such transfer; never had any knowledge of it until it was developed in the taking of these depositions for use in this suit.

Q. You may state, what, if any, notice, knowledge or
334 information you received from John A. Wisherd relative to keeping good the alleged tenders claimed to have been

made to Russell & Holmes, or at the banking house known as "Tecumseh National Bank", in the first National Bank of Lincoln, Nebraska?

A. Wisherd never gave me any notice or information of any kind concerning any tenders or deposits of money in the First National Bank for my use, to be applied on this contract.

Q. What knowledge or information came to you relative to this matter?

A. The only knowledge or information that I have ever received about any money being deposited in the First National Bank of Lincoln, came to me from Russell & Holmes.

Q. Did you have any other or different knowledge or information other than that you have already testified to and that which is contained in the various letters received from Russell & Holmes, copies of which are attached to the deposition of Charles A. Holmes, herein?

A. I did not. All the information I had is contained in these letters which have been introduced in evidence in this suit.

Q. You may state whether or not Russell & Holmes were your agents for the collection of the notes referred to in Exhibit "A"?

A. They were not my agents for the collection of any notes mentioned in this contract except when I left the notes in their hands for collection, as I have already stated.

Q. How many trips did you make to Nebraska in regard to this matter?

A. I do not remember, eight or ten; I made a good many visits to Tecumseh for the purpose of getting the money on these Wisherd notes.

Q. How far is it from Jerseyville to Tecumseh, Nebraska?

A. It is about 450 miles.

Q. State whether or not the note that fell due and was paid in May, 1883, was remitted at one time, or whether it came in the form of partial payments?

335 A. It all came in one sum at one time.

Q. In what form was it remitted?

A. The bank gave me credit on my personal account.

Q. What bank?

A. The First National Bank of Jerseyville, with whom I deposited it for collection. They received from Russell & Holmes a draft on Chicago for it.

Q. Do you remember the number of the draft?

A. I can give it to you No. 44687, on the Northwestern National Bank of Chicago, for $906.00. I received credit for it on May 24th, 1883. It is not true that I received any partial payments on the note.

Q. State if you know when this note was forwarded by the First National Bank of Jerseyville, Illinois, to the banking house of Russell & Holmes of Tecumseh, Nebraska?

A. It was forwarded from Jerseyville, Illinois on April 30, 1883.

Q. What was the ordinary length of time by which mail from Jerseyville, Illinois, would reach Tecumseh, Nebraska, at that time?

A. Letters mailed here one day would be received there the next day. Occasionally there would be a day intervene, but the rule was it would be received there the next day.

Q. Do you know of your own knowledge that this land involved herein has ever been sold for taxes?

A. I do know; that is, I got my information from the County Treasurer's office in Beatrice, Nebraska; I was not present at any sale.

Q. Were you in the County Treasurer's office and did you examine the records?

A. I did examine the records and the books and saw that—

(Complainant objects to witness stating what the records show.)

Q. You may state when this land was sold for taxes?

(Complainant objects to question as incompetent, immaterial and irrelevant.)

336 A. Sold for the taxes of 1887, 1888, 1889, 1890, 1891 and 1892.

Q. (By Mr. Sabin.) Then what you are testifying to now is just the information you have learned from other parties, is it not?

A. No, sir, I learned it from the records, themselves.

Q. (By Mr. Sabin.) You are now swearing from a memorandum you took of the records?

A. Yes, sir.

(Complainant moves to strike out the evidence of witness, pertaining to the sale of said land for taxes, as incompetent, immaterial and irrelevant.)

Q. (Examination by Mr. Magoon resumed.) Did you redeem the land in controversy from any tax sale? If so, state which tax sale.

A. I did redeem the land from the tax sale for 1892. The redemption cost me $521.95, for which I received five redemption certificates, all dated April 5th, 1894, all signed by I. J. France, County Treasurer of Gage County, Nebraska. The redemption for section one-five seven cost me $115.35; section 24-6-7 cost me $112.05; the north east quarter of 5-5-7 cost

me $199.05; the west half of 6-5-8 cost me $27.80, for which I paid the money.

(Complainant objects to answer of witness.)

Q. Will you allow the notary to identify these redemption certificates and have them produced at the trial?

A. I will.

Q. Have you ever been paid by the complainant, or by John A. Wisherd, or any person representing him, the amount which you paid to redeem this land from the tax sale for the taxes of 1892?

A. I never have.

Q. Has any tender or payment been made to you therefor?

A. Never has.

Q. Will you allow the original of Exhibit "A" to be
337 attached to your deposition, or do you desire that a copy thereof shall be attached to the deposition and the original produced upon the trial?

A. I much prefer that a copy be attached, and that I retain the original paper and produce it at the hearing.

(Respondent Cheney offers in evidence documents marked Exhibits "P", "Q", "R", "S" and "T", to which introduction the complainant objects as incompetent, immaterial and irrelevant.)

Q. When did you first learn that this land, or any portion of it, had been sold for taxes?

(Complainant objects to question as incompetent, immaterial and irrelevant.)

A. I cannot tell you.

Q. About when?

A. Shortly before I redeemed it.

Q. Did you know prior to the year 1894?

A. No, sir.

Cross Examination,

By Mr. Sabin.

Q. This contract was not delivered for sometime after its date, was it?

A. I was not present when the contract was delivered. I executed it in Jerseyville and sent it to Pinero & Selby at Tecumseh, directing them to close the transaction with Wisherd, but what day the business was transacted, I am not able to state; I see it was acknowledged on the second day of July, 1881.

Q. It could not have been before the acknowledgment, could it?

A. No, sir, I should say from that it was delivered on the day it was acknowledged, but as to that I have no personal knowledge.

Q. You don't know of your own knowledge whether the signature attached to the duplicate that you have of Exhibit "A" is the signature of Wisherd, or not?

338 A. I did not see him write it; I had no knowledge of Wisherd; never heard of him, never had any transaction with him prior to this one; of course, I did not see him write it; I do not know anything about the signature.

Q. You can state whether this is your signature attached to that contract, marked complainant's Exhibit "X", to the deposition of John A. Wisherd.

A. Yes, sir, it is my signature.

Q. This paper, said Exhibit "X", this contract is the one you sent to Wisherd in lieu of one that he claimed was lost?

A. Yes, sir, that is right.

Q. Do you say that you collected the first note that fell due in 1882?

A. I did.

Q. The money was sent here and you forwarded the note?

A. No, sir, that is not true. I sent the note; the money was collected by Russell & Holmes and placed to my credit on my account in their bank.

Q. Are you positive you sent that note prior to the time it fell due?

A. I am.

Q. Have you any record of that?

A. No, sir, but I have a record of the payment when it was made, and that it was credited to my account in the bank of Russell & Holmes.

Q. Now in regard to the payment in 1883 of $905.63, how was that note paid?

A. I left the note in the First National Bank of Jerseyville, Illinois for collection, about two weeks before it was due, and the Bank sent it to Russell & Holmes for collection, and they received a draft on Chicago in return, and they credited it to my account, $906.00 on May 24, 1893, all in one sum, and Wisherd is not correct when he said it was paid in partial payments. It is absolutely not true.

339 Q. How do you know that the note was sent by the First National Bank?

A. Because I deposited it with them for collection. I received the money from them for it.

Q. You don't know whether the note was ever forwarded or not, of your own knowledge?

A. No, sir, I did not write the letter, or put it in the post-office.

Q. Do you claim that the notes were forwarded to the bank in 1884? The two notes due that year?

A. Yes, sir.

Q. By whom were they forwarded?

A. I forwarded them myself by a special messenger, who was my brother, Gilead P. Cheney.

Q. These two particular notes?

A. Yes, sir, these two and the notes concerned in the contract were in an envelope in which I kept them.

Q. I will ask you if the notes were not all attached together in sheets, these two notes with the others, at the time, these two notes not having been separated from the others?

A. Might be so. I believe it was so.

Q. Were they not still in that condition at the time you tried the ejectment suit in January, 1887?

A. I presume they were.

Q. Have you not the original letter that you received from Wisherd, dated July 9th, 1884?

A. That is attached to the bill of exceptions that is lost. I have not got the original.

Q. Did you receive a letter from Wisherd on or about July 21, 1884?

A. No, sir, never received the letter.

Q. Well about that time you sent him a registered letter containing the notes, did you not?

340 A. I sent him a registered letter on July 14, 1884, containing the sixteen unpaid notes.

Q. Didn't you refuse to take out of the post-office here a registered letter sent to you from Dawson, Mo, after that?

A. I believe a letter came here from Wisherd addressed to me, which I refused to take out of the office, but what it contained is more than I know.

Q. Why did you refuse to take it out of the office?

A. Because prior to that time I had received intimation from Wisherd that he was going to bring suit against me in court.

Q. For what?

A. The Lord knows what for, I don't know.

Q. You may state whether you have in you- possession a letter dated at Dawson, Mo. August 28, 1884, from John A. Wisherd to yourself?

A. I have not.

Q. Did you receive a letter of that kind?

A. I did not.

Q. The letter referred to Exhibit ".3" of John A. Wisherd deposition—why were [—] not willing to receive the money

mentioned in the letter written from Dawson, Mo. on August 28, 1884?

A. Because the time had gone by at which he promised to pay them. I had been at great expense in trying to get the money but was unable to get it, according to the contract.

Q. Were you not hunting for an excuse to declare a default of the contract at that time?

(Respondent Cheney objects to the question as incompetent, immaterial and irrelevant, and calling for a conclusion of the witness.)

A. I was not hunting for an excuse. I was insisting on the performance of the contract.

Q. Why were you not willing to take the money without so much technicality?

341 (Respondent Cheney objects to the question as incompetent, immaterial and irrelevant.)

A. I never had the opportunity of getting the money; no money has ever been offered to me by Wisherd; I didn't believe I could get it.

Q. Why did you not place the notes in the bank at Tecumseh where they were made payable, so he could have gone there and paid them?

A. I did have the notes in the bank at Tecumseh on the day they were due for the purpose of payment, and there was no money there to pay them with.

Q. Did you expect Wisherd to leave the money at the Bank in Tecumseh for you to go and get at your pleasure?

(Respondent Cheney objects to the question as incompetent, immaterial and irrelevant.)

A. I never expected anything of Wisherd except what he promised to do by the terms of his contract.

Q. I would like to have you answer my question.

(Respondent Cheney objects to the question as incompetent, immaterial and irrelevant, and as having already been answered.)

A. I only expected Wisherd to be at the Bank of Russell & Holmes to pay me the money at the maturity of his notes. I was there ready with the notes, ready to receive the money by my representatives.

Q. You don't know of your own knowledge, do you, that you had any representatives there at the date the notes fell due, except the Bank of Russell & Holmes?

A. The Bank of Russell & Holmes were not my representatives; were never authorized by me to receive the money

for me. I sent a special messenger there in the person of my brother, Gilead P. Cheney, with the notes, and authorized, ready, anxious and willing to accept the money in payment of the notes.

Q. You don't know of your own knowledge that you had any representative there at the date that the notes fell due
342 in 1884?

A. I know of my own knowledge that I sent a representative there with the notes, and with instructions to surrender the notes upon payment of the money; I was not present on the date, as it was quite impossible for me to be in two places at the same time, when they were 100 miles apart.

Q. You made out these notes, didn't you write the notes except the signature of Wisherd, so as to make them payable at the bank of Russell & Holmes of Tecumseh, Nebraska?

(Respondent Cheney objects to the question as incompetent, immaterial and irrelevant.)

A. I think that I did prepare the notes ready for signature; they were made payable at the Bank of Russell & Holmes, to accommodate Wisherd, because that Bank was near the land that he had contracted for, and that he said he was going to occupy.

Q. Did you receive a letter from Russell & Holmes about the 18th or 19th of May, 1885, a copy of which is attached to Charles A. Holmes' deposition, marked Exhibit "D," dated May 18th, 1885?

A. Yes, sir, I did receive the letter.

Q. Have you got the letter now?

A. Yes, sir.

Q. That is the letter that you have already introduced in evidence, marked Exhibit "E"?

A. Yes, sir.

Q. Did not that cover the amount of the notes that were then due or past due, together with interest up to that time?

A. I think not.

Q. You are not willing to swear that it did not?

A. Do you want me to make a computation here?

Q. Did you make a computation at that time to see whether it did or not?

343 A. I do not remember whether I made a computation at that time or not, because the notes were then in the possession of John A. Wisherd, and had been for many months.

Q. Well, you were not willing to receive the money anyway, were you?

A. I never saw the day when I could get a dollar out of Wisherd.

Q. Did you try at that time to get any money out of him?

A. I did not try on the 18th day of May.

Q. Why did you not try?

A. Because he was in Tecumseh, Neb. and I was in Illinois; never could find that man; always gone; here and there, and somewhere else. I heard he was at Quitman, Mo. Dawson, Mo, Adams, Nebraska; Lincoln, Nebraska; Colorado, Texas; Clarkson, Nebraska; Madison, Nebraska; always at a distant place, inaccessible.

Q. This letter stated to you that the money had been on deposit at the First National Bank of Lincoln for you—why did you not go there and see whether it was there or not?

Respondent Cheney objects to the question as incompetent, immaterial and irrelevant, as the witness has already stated that he had declared the contract forfeited.)

A. My contract did not require me to go to the First National Bank of Lincoln. Finally when I did go there I was unable to get the money; they had no [meny] to pay me.

Q. Did you go there during the year, 1885, to see whether you could get this money, or not?

A. No, sir, I did not.

Q. Would you not have taken the better view of the case to have gone there and seen whether the money was there or not?

(Respondent Cheney objects to the question, as incompetent, immaterial and irrelevant, and the proper foundation not having been laid for the introduction, such condition of facts not having been known to exist.)

344 A. The sight of the actual money would have had great influence on me. I never was subject to the test. It is quite impossible for me to say what I would have done under a condition that never existed.

Q. This letter dated May 18, 1885, states that you could get the money there at any time, you or your attorneys—I ask you the question whether you would have taken the money if you could have got it?

(Respondent Cheney objects to the question as incompetent, immaterial and irrelevant, and as having been already answered.)

A. I was always ready and willing to accept the money, according to the terms of the contract. I was not willing to change the terms of the contract.

Q. At that time you had already entered suit to get possession of the land, had you not?

A. I cannot tell when the suit was commenced; the record is the best evidence.

Q. Did you receive a letter from Russell & Holmes of Tecumseh, Neb. May 5th, 1886, and marked Exhibit "C" of Charles A. Holmes' deposition?

A. I suppose I did.

Q. Have you that letter now?

A. I have not the letter now, I suppose I received it.

Q. Do you know where it is?

A. I do not know where it is. I don't know whether it is attached to that lost bill of exceptions or not.

Q. Have you got it in your possession?

A. I have not. At the time the letter was written, the notes were in the possession of Wisherd; it was impossible for me to produce them.

Q. You had placed them in his possession by your own accord, had you not, without his request?

A. Had sent them to him, and in connection therewith had declared a forfeiture of the contract, hereinbefore referred to.

Q. He had tried to return the notes to you, and you had not received them back?

345 A. I never heard of his trying to return the notes to me.

Q. You refused to take out the registered letter from him, had you not, as you stated?

A. I refused to take a letter from the post-office, but I do not know what it contained.

Q. Did you receive a letter from Russell & Holmes, dated Tecumseh, Neb. May 5th, 1888, a copy of which was attached to C. A. Holmes' deposition, marked Exhibit "E?"

A. I don't know that I did, get this in 1888, I got one in 1889.

Q. Do you remember whether you received this letter or not?

A. I don't think I ever received it. Don't remember of receiving it; I know I have not got it. Don't remember of ever having it.

Q. You have not got the letter in your possession now?

A. No, sir, I know I have not.

Q. Letter was lost after receiving it?

A. I never received it. I know I would remember if I had.

Q. Are you positive you did not receive it?

A. I am positive I never received it, because I have got all these papers together in one place.

Q. Have you got the letter dated Tecumseh, Neb. May 8, 1889, from Russell & Holmes, a copy of which is [attcahed] to

Charles A. Holmes' deposition, marked complainant's Exhibit "D?"

A. Yes, sir. I have that letter, it is down in my office; I can get it if you wish.

Q. Is the Exhibit "D," attached to Holmes' deposition, a true copy of it?

A. I think it is without reading it word for word. Know no reason to doubt it.

Q. You had possession of these notes in 1886, 1887, 1888 and 1889?

346 A. No, sir, I did not until after the ejectment suit was tried. I am a little mixed about the date.

Q. Assuming the fact to be that the ejectment suit was tried in January, 1887, you had possession of the notes from that time on, had you not?

A. I did.

Q. Until 1891?

A. May 1891. I held them subject to the order of Wisherd. I made four separate efforts to return them to him.

Q. After you were defeated in the ejectment suit, why were you not willing to take the money that was due?

A. Could not get it.

Q. You were notified every year that the money was tendered there and ready to pay you each year the notes fell due?

A. Yes, sir, as soon as I got there there was no money there.

Q. You did not go there to see did you?

A. I went there.

Q. The first year you went there was 1890, was it not?

A. First year I went there was 1890.

Q. That is represented in your letter to Russell & Holmes, dated May 17, 1890?

A. Yes, sir.

Q. You state in this letter that [your] want Wisherd to pay the full amount of principal and ten per cent. on each of the fourteen notes, according to their terms?

A. That is right.

Q. That is, he was to pay ten per cent. on both principal and interest?

A. After maturity, according to the terms of the notes, because he failed to pay the notes when they came due.

Q. When they came due, why didn't you take the money?

A. I never could get it.

347 Q. You were notified every year by Russell & Holmes that you could get it, were you not?

A. Always several thousand dollars short.

Q. Do you claim there was more than $5185.00 due from Wisherd, taking the principal and ten per cent. interest on all the paper after maturity, on the 18th day of May, 1885?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant, calling for a conclusion of the witness, and as having already been answered; and that the notes were not in Cheney's possession, but they were in the possession of Wisherd, and that the contract has been declared void and at an end, and the notes returned to Wisherd in compliance with the law and the contract.)

A. I have no computation prepared from which I can say exactly how much was due on the notes according to their terms on May 18th, 1885, but at that time the notes had been returned to Wisherd and were in his possession, and I had declared a forfeiture of the contract, and did not regard the notes as being in force.

Q. Was there more than $8351. due from Wisherd on this contract, principal and interest, on the 5th day of May, 1886?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant.)

A. I cannot answer the question accurately, as I have no computation at hand to refer to; at that time the notes were in the possession of John A. Wisherd, and the contract had been declared null and void, and a suit in ejectment was then pending in the United States Circuit Court.

Q. You had a duplicate of the contract in your possession, had you not at that time?

A. I had.

Q. You mean by this letter of May 17, 1890, instructions to Charles A. Holmes, when you left the notes in his hands,
348 that you were not willing to give Wisherd, or anybody else who claimed any interest in the contract, any benefit of any tenders that had been made before that time, or any offers of payment, but meant to exact the full amount of the notes and all interest payments and ten per cent. from their maturity?

(Respondent Cheney objects to the question as incompetent, immaterial and irrelevant, the instructions being in writing being the best evidence, there being no ambiguity to explain.)

A. When I left the notes with the Tecumseh National Bank on May 17, 1890, I instructed the bank to receive the money from Wisherd on all the notes according to the terms of the notes themselves. I was then satisfied that all his pretended tenders, or offers of payment, were bogus, and not made with any intention that I should ever receive the money, because whenever I had attempted to get the money it was always gone. As a matter of fact, the money was never in the Tecumseh National Bank, or under their control so they could

pay it to me. It was always there in charge of somebody else. Immediately upon receiving notice that the money was there, I went to the Bank of Russell & Holmes and they stated that the money had been taken away, and was only there for a few minutes or half of an hour at a time, and then carried back to Lincoln on the train.

Q. You were always very careful to not leave the notes there in advance of their payment so they could be paid, were you not?

(Respondent Cheney objects to the question as incompetent, immaterial and irrelevant.)

A. I was always careful to have the notes at the bank of Russell & Holmes when they came due for the purpose of receiving the money on the notes. I never was able to receive a dollar after the payment of the two first notes, which fell due in 1882 and 1883. Since that time I have never seen a single dollar belonging to Wisherd, nor a single dollar has never been shown to me by any bank, any person, any attorney, or any living creature.

349 Q. You can state whether these notes, or any part of them, were in that bank for payment by your directions from the year 1884, until the year 1890?

A. They never were, because the amount he offered to pay always fell short of the amount that was due, according to the terms of the notes.

Q. Were you afraid to leave the notes at the bank of Russell & Holmes at the time they fell due?

(Respondent Cheney objects to the question as incompetent, immaterial and irrelevant.)

A. No, sir, I was not afraid.

Q. Then why didn't you do it?

(Respondent Cheney objects to the question as incompetent, immaterial and irrelevant.)

A. Because I saw plainly there was no intention on the part of Wisherd to make me any payment of money.

Q. You would have been showing your good faith to have left the notes there when they fell due to see whether he wanted to pay them or not, would you not?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant.)

A. Was there present with the notes, ready, willing and anxious to receive the money, and he was not there with the money to pay them. It would have served no purpose for me to have left the notes there.

Q. You don't claim to have been there with the notes only in the year, 1890?

A. No, sir, not personally. I sent a representative there in 1884, who had the notes and who acted for me.

Q. Why didn't you send the notes there between those dates so that Wisherd could have paid them if he had wanted to?

A. Because I returned the notes to Wisherd in 1884; he kept them for three years in his own possession, and under his control. I had no way in the world to reach them.

350 Q. After you did get possession of them, why didn't you do so?

A. I was advised that the contract was not in force, and did not bind me to convey the land; that he had forfeited his rights in it by a failure to comply with its terms. I looked upon that contract as dead, and was unwilling to have it revived.

Q. In other words you were quite anxious to get the land back and didn't want the money?

(Question objected to by respondent Cheney as incompetent, immaterial and irrelevant.)

A. Those words are yours and not mine.

Q. I ask you if that was not the case?

(Question objected to by respondent Cheney as incompetent, immaterial and irrelevant.)

A. I was seeking to enforce the terms of the contract; was relying upon my legal rights in the premises.

Q. In other words, you wanted the land back and not the money, is that the case?

(Question objected to by respondent Cheney as incompetent, immaterial and irrelevant.)

A. The attempt of the attorney to put an answer in my mouth is resented.

Q. I will ask you if you were not trying to get the land back instead of taking the pay for it at that time?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant.)

A. At that time, and ever since, I have been trying to get my land back; because I could not get my pay for it, and because the contract has been violated in every respect. He did not pay me the interest, did not pay me the principal, didn't pay the taxes on the land. He kept the land and the money

and the notes and everything connected with it, and ig-
351 nored me and ignored the contract entirely.

Q. He tried to have you keep the notes, did he not? He didn't want the notes, did he?

(Respondent Cheney objects to the question as incompetent, immaterial and irrelevant, improper, and calling on this witness to state what his adversary's wishes, desires, or intentions were in the matter.)

A. I cannot say what Wisherd's wishes were, but when he kept the notes for three years, I surely thought he was satisfied with the custody and control of the notes.

Q. I will ask you if you were not forced to take those notes back in open court at the trial in this ejectment suit?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant.)

A. I never heard that any compulsion was exercised in the matter.

Q. I will ask you if you were not tendered those notes in open court during the progress of the trial in that ejectment case and received them back, and they were tendered to you on behalf of John A. Wisherd, by his attorney?

A. I believe it is true that the attorneys of Wisherd tendered the notes during the progress of the trial and threw them down on the table. I am not quite certain exactly what was done. My best recollection is that I did not take them, but they were deposited with the clerk of the court subject to my order.

Q. You said that you were in Tecumseh on May 5th, 1891, and on the 6th you went to Lincoln, and had a conversation with Mr. McFarland, president of the bank, and also with Mr. Callahan, the cashier, in regard to whether they had the money there to pay the Wisherd notes?

A. Yes, sir, that is true.

Q. Now didn't Mr. McFarland at that time tell you that the money was there and you could have the money, this $19,512.00?

A. He did not tell me the money was there. Said a draft was there.

352 Q. Didn't he tell you at that time you could have the money?

A. No, sir, he did not tell me I could have the money; said I could have a draft; the draft was good; that Bilby was a responsible man; the draft was payable in Quitman, Mo.

Q. You swear positively he didn't tell you you could have that money?

A. I do.

Q. You didn't want that money, did you?

(Respondent Cheney objects to the question as incompetent, immaterial and irrelevant.)

A. Yes, sir.

Q. Would you have been willing to take that amount of money at that time?

A. No, sir, not that amount; that amount was some $6,000.00 less than what was due me.

Q. What you were claiming was the face value of the notes and ten per cent. interest after their maturity?

A. What I was claiming was the amount of the notes with the interest that was promised in the notes.

Q. You will answer my question? (By Mr. Magoon. "Finish that answer.) I will ask you this: the amount you claimed due you at that time was the face of the notes, both principal and interest, with ten per cent. from their maturity?

(Respondent Cheney objects to question as incompetent, [immaterisl] and irrelevant, and calling for a claim of the witness, and his opinion, and as having already been answered.)

A. What I claimed was this: that there was due me the face value of all the notes, all of which had then matured, and that the notes drew ten per cent. after maturity until payment was made.

Q. That is the amount you exacted or wanted and claimed at that time?

353 (Respondent Cheney objects to question as incompetent, immaterial and irrelevant, no foundation laid for the introduction, and assuming a condition of facts not shown to exist, and as improper cross examination for the reason that the witness has not testified to any claim or demand made by him at this time and the time referred to in the question.)

A. My visit to the First National Bank was to see Mr. Callahan, who had been in Tecumseh a few days before, with the sum of $19,512.00, and find out how he arrived at that sum. I wanted to see the computation that stated that that was the sum due me.

Q. Did you find it out?

A. I found that the sum of $19,512 was the arbitrary amount fixed by Wisherd. Wisherd had told him to tender that amount; he said he did not know whether it was right or wrong, or anything about what computation was made by which it was arrived at.

(Defendant moves to strike out answer of witness in relation to what Mr. Callahan told him Wisherd said, as not responsive to the question.)

Q. The amount that you were claiming due you under this contract at that time was the amount of the face of the notes, principal and interest, at ten per cent. after their maturity, was it not?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant, and improper cross examination, for the reason that the witness has testified to no amount as being due him on said notes, and as calling for the conclusion of the witness, and therefore incompetent because the amount due on said notes and contract is to be determined by the court.)

A. I did not present any claim for any definite sum. I had made no computation of the exact amount that was due me, but I had made a computation which showed that the sum of $19,512.00 was five or six thousand dollars less than would be due, according to the terms of the contract and the promissory notes, but I had not fixed on a certain sum, or
354 fixed upon any sum and demanded that amount, because the people of the bank told me all they had to pay was $19,512.00.

Q. How much do you claim an- say now was due at that time under this contract?

A. I have no computation made. I am not able to answer the question, but at that time the contract had been declared null and void and was not in existence.

Q. You were around at that time seeking money, were you not?

A. I was around seeking information.

Q. Were you not wanting to get pay for the notes at that time?

A. It is quite impossible for me to say what I would have done, if I could have got it. I found out from the First National Bank that they would pay me this draft on Bilby, of Quitman, Mo. for $19,512.00, if I would deliver to them the notes and the deed; that is what they demanded of me; what I demanded of them was, how they arrived at the sum of $19,-512.00.

Q. You had not declared the contract void then, had you, at that time? You had signified a willingness to take the money, had you not?

A. Yes, I had, I kept on declaring it void; sent four declarations, four notices, that the contract was void.

Q. Why did you claim that the sum of $19,512.00 lacked five or six thousand dollars of being the amount due on the contract at that time?

A. Because adding interest on the notes to each installment after [meturity] up to that time amounted to some five or six thousand dollars more. That is why.

Q. And the interest on the principal also after maturity?

A. Why certainly, each principal installment was to draw interest after maturity if it had not been paid.

Q. Also the interest notes?

A. Certainly.

Q. Now you say that you sent the notes by express some time in the year 1891?

355 A. I sent them that same day.

Q. What day was that?

A. May 6, 1891. Spent the afternoon talking with Mr. McFarland and Mr. Callahan of the First National Bank, and sent the notes by express that night to Clarkson, Neb. to John A. Wisherd.

Q. You never said anything about this deed, did you, before? Never notified anybody there you had a deed?

A. Yes, sir.

Q. Whom did you tell that?

A. Told the people of the bank that; they made the bargain I could not have the draft unless I gave the notes and a deed.

Q. Do you say you told the bank you had a deed there?

A. I do.

Q. Now you say you made a good many trips to Nebraska in regard to this matter?

A. Yes, sir.

Q. Was not the most of the trips you made there in relation to the law suit you had started?

A. No, sir.

Q. You started the ejectment suit in 1884, did you not, to dispossess Wisherd from the land after you had declared a forfeiture?

A. Yes, sir, I do not know the date. There was such a suit.

Q. You didn't make any trips back there after that to get the money due you until 1890?

A. No, sir.

Q. What was your idea of redeeming this land from the tax sale in 1884?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant.)

A. To prevent cloud on the title; to prevent tax title being issued against the land.

356 Q. Do you now hold the legal title to that land, Mr. Cheney?

A. I do.

Q. Do you have any objections to making a deed to the complainant, providing you get your pay?

A. It depends upon how much pay I get.

Q. What I mean is, do you have any objections to whom [—] get the money from, or to whom you make the deed?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant, and not the best evidence. The bill in the case showing the plea that the respondent makes in this action is the best evidence.)

A. In this suit I rely upon my legal rights, and am endeavoring to have the terms of the contract complied by Wisherd. I never had any transaction with Bilby in any way, shape or form; never had any correspondence with him or communication with him direct or indirect, with reference to this contract. What I might do in an amicable way, outside of this suit, is a matter that I cannot testify to until the terms should be made known to me.

Q. You have testified that this land has been sold at different times at tax sales—I will ask you if you were not informed that it had always been redeemed by Bilby from the several sales with the exception of the one you redeemed from since this suit commenced?

A. The records of the County Treasurer's office of Gage County—

Q. I do not want you to swear to the records.

A. (Continued.) Show that the land has been redeemed from all tax sales; by whom it was redeemed I do not know except for one year, when I redeemed it myself.

Q. There was no immediate danger of the tax deed being issued on the sale that you redeemed from for several months, was there?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant, and as calling for a conclusion of the witness on a question of law.)

357 A. I do not know what the statutes of Nebraska say in reference to land selling for taxes.

Q. Referring back to the year, 1884, was the failure of that firm in New York City affecting your financial condition to any great extent?

A. The firm in New York City did not owe me anything, but there was a general panic in the land affecting money, and matters everywhere; made it very hard to collect money, and the use of money at that time would have been of great value to me.

Q. Referring to the letter dated July 9, 1884, at Omaha, by Wisherd, referred to as Exhibit "Z" of John A. Wisherd's testimony, he states there that he would pay the notes if you would place them in the bank of Russell & Holmes of Tecum-

seh, Nebraska—Why did you not do so at that time so he could pay them there and get his notes?

A. Because when said notes were due I sent them to the bank of Russell & Holmes, by special messenger, at considerable expense to myself, and the money was not there to pay them with, and I had notified Wisherd by letter of June 16, 1884, that in consequence of his default his contract became null and void and was terminated and ended.

Q. You still demanded in your letter the amount of these notes as rent, did you not?

A. No, sir.

Q. That is what you say in your letter?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant, and not the best evidence, as the letter is the best evidence.)

A. No, sir, I demanded possession of the land and the stipulated sum of $2792.37 as the yearly rent of same, according to the stipulation in the contract concerning that subject.

Q. The amount of $2792.37 was the amount of the two notes that fell due that year, was it not?

A. Very near it.

358 Q. How much difference was there between the amount of the two notes and that amount?

A. Mr. Sabin says there is one cent difference; I think he is a good mathematician; I accept his statement of one cent as correct.

Q. You still wanted pay for the notes and wanted the land back too?

(Respondent Cheney objects to question as being incompetent, immaterial and irrelevant.)

A. The contract provides that if Wisherd made default in purchasing the land according to the terms of the contract, that he pay a certain yearly rent for the use and possession of it; that is all I asked for.

Q. Did you dispose of those notes during the time you had them in your possession?

A. I did not.

Q. I see they are all indorsed "without recourse on me in any event," signed "Prentiss D. Cheney," and afterwards your name was scratched out?

A. Yes, sir, the words "without recourse on me in any event" is printed there and my name is signed under there; that is true; that is the way I have all my notes.

Q. Your name is not printed?

A. I know; it is written there.

Q. Did you ever sell or dispose of the notes?

A. I never did. I keep notes in my possession and they are indorsed the same way.

Q. The name is cancelled?

A. Yes, sir, I did that when I sent them back to Wisherd.

Q. Did you have any other object in indorsing these notes in this way?

A. Not in reference to Wisherd.

Q. They were not sold?

A. No, sir, it was not any matter of Wisherd's.

359 PRENTISS D. CHENEY.

And the said Andrew W. Cross, being first duly sworn, on oath, testified as follows:

Examined

By Mr. Magoon.

Q. Give your name, age, occupation and place of residence.

A. Andrew W. Cross; 49; Jerseyville, Illinois; president of the First National Bank of Jerseyville.

Q. Do you know Prentiss D. Cheney, the respondent in this cause?

A. I do.

Q. How long have you known him?

A. All my life.

Q. What was your occupation in 1883?

A. I was acting as cashier or president of the First National Bank of Jerseyville.

Q. Did the First National Bank of Jerseyville in the month of April, 1883, receive a note for $905.63, drawn to the order of Prentiss D. Cheney, and signed by John A. Wisherd, which note fell due on the second day of May, 1883?

A. I cannot say in what month I received it.

Q. Did the bank at any time receive such a note?

A. It must have done so.

Q. What did the bank do with that note?

A. April 30, 1883, I sent Messrs. Russell & Holmes, of Tecumseh, Nebraska a note of John A. Wisherd's, for $905.63, due May 2, 1883, (that is the date in the letter said it was due May 2nd.)

Q. How did you send this note to Russell & Holmes, at Tecumseh, Nebraska?

A. By letter and mail.

Q. Have [—] the original of the letter in which the note was enclosed to Russell & Holmes?

A. No, sir.

Q. Have you a copy of the letter in which said note was enclosed to Russell & Holmes?

360 A. I have.

Q. What kind of a copy is it?

A. Letter press copy.

Q. In what is it contained?

A. In the letter book used at that time by said First National Bank.

Q. On what page of said letter book does this letter appear?

A. Page 481.

Q. Are you willing to allow the letter press copy book to be attached to your deposition and forwarded to the court to be used in evidence in this case, marked Exhibit "U"?

A. I cannot do it without the consent of the Board.

Q. Will you allow the notary to make a copy of said letter and attach it to your deposition, making it a part thereof?

A. I will.

(Respondent Cheney offers in evidence the letter press copy referred to by the witness, for the purpose of making a copy thereof and having it attached to the deposition of this witness, and used in evidence herein.)

(Complainant waives the original letter press copy, but objects to the letter press copy as not being the best evidence.)

Q. After an examination of the letter book, can you state on what date said note was forwarded by the First National Bank of Jerseyville to Russell & Holmes of Tecumseh, Nebraska?

A. April 30th, 1883.

Q. Was said note paid?

A. I received remittance in payment of said note.

Q. How was the remittance made?

A. Remittance was made by draft of Russell & Holmes, No. 44,687, on the Northwestern National Bank of Chicago.

Q. Was the note paid in full at one and the same time?

361 A. This remittance was for $906.00 in full payment of the note, so far as I could judge.

Q. Will you read to the notary the letter in which you sent the note in question to Russell & Holmes of Tecumseh, Nebraska?

(Complainant objects to the introduction of the letter press copy as incompetent, but does not object to witness producing letter press copy and does not object to the witness reading the letter instead of attaching same to the deposition.

Letter press copy read by witness, A. W. Cross, as follows:

"April 30th,.....3.

Messrs. Russell & Holmes,
Tecumseh, Nebraska.

Gentlemen:—I enclose for returns no. 3503, J. A. Wisherd, $905.63, due May 2nd.

Yours respectfully,

A. W. CROSS, Cas."

Q. Who wrote that letter?
A. I did.
Q. Whose signature is attached thereto?
A. My signature.

Cross-Examination.

By Mr. Sabin.

Q. That notice (handing witness paper) is that your handwriting?
A. It is.
Q. Do you know what year that was sent?
A. I do not.
Q. Did you have all of these notes of Mr. Cheney's that Wisherd gave, as business with your bank?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant, and not proper cross-examination.)

A. I did not.
Q. Were the notes ever put up in your bank here as collateral security, or did you ever buy the notes, in fact
362 ever own the notes?

(Respondent Cheney objects to question as incompetent, immaterial and irrelevant, and as improper cross-examination.)

A. The notes of Mr. Cheney's, Wisherd's among others, were left in an envelope in my vault, and not left as collateral security, and were never owned by the bank.
Q. Were they ever left as collateral at any time?
A. No, sir, never were.

A. W. CROSS.

COPY OF EXHIBIT "A."

This indenture, made this 2d day of May, in the year of our Lord one thousand eight hundred and eighty-one, between Prentiss D. Cheney of Jerseyville, Jersey County, Illinois, party

of the first part, and John A. Wisherd of Nodaway County, Missouri, party of the second part,

Witnesseth: That in consideration of the stipulations herein contained and the payments to be made as herein specified, the first party doth by these presents demise and let to the second party the possession and use of the land herein mentioned to the said second party said premises, situate and being in the County of Gage, in the State of Nebraska, known and described as follows, to-wit: All section one, town five, range seven being..... 646.28
All section twenty-four, town six, range seven being.. 640.
All section nine, town six, range eight being..... 640.
North east quarter, sect. five, town five, range seven being..... 164.42
Fractional west half sect. six, town five, range eight being..... 124.51

In acres a total of..... 2215.21

The sum agreed upon for the possession, use, occupancy and control of said land is $2792.37/100 yearly, which is represented and included in the notes executed by said second party described herein, and also the whole amount of the taxes that are or may be assessed against said land. The pur-
363 chase price of said land is Fifteen Thousand five hundred & six 47/100 dollars, of which payment has been made of Four hundred & twelve & 55/100 dollars at the execution of this contract. The balance is to be paid, without notice or demand therefor, in ten annual payments, at the times specified in Eighteen certain promissory notes, of even date herewith, signed by John A. Wisherd payable to the order of P. D. Cheney one note being for 1886.73/100 dollars, due three years after date, one note being for 1886.73/100 dollars, due four years after date, one note being for 1886.73/100 dollars, due five years after date, and five other notes for $1886.73/100 each due in six, seven, eight, nine and ten years after date, which eight are the principal notes, the other ten notes being for the yearly interest, viz: First note $905.63/100; second note, $905.63/100; third note, $905.63/100; fourth note, $792.43/100; fifth note, $679.23/100; sixth note, $566.03/100; seventh note $452.83/100; eighth note $339.63/100; ninth note, $226.43/100; tenth note, $113.23/100, due consecutively in one two. three, four, five, six, seven, eight, nine and ten years after date, all payable at the office of Russell & Holmes in Tecumseh, Neb. without interest before due, and with ten per cent. per annum after maturity. And the said second party, in consideration of this agreement, hereby agrees

to make punctual payment of the above sums of principal and interest as each of the same respectively becomes due, and will also regularly and seasonably pay all the taxes and assessments against said land.

Wisherd contracts and agrees to break one-third of each of the five tracts described in season of 1881.

Wisherd contracts and agrees to build six dwelling houses at proper points within one year from date, which dwelling houses shall be good and suitable for dwelling purposes and to cost not less than $250. each.

Cheney is to pay taxes of 1880 and to warrant against all former year's taxes.

364 Wisherd is to pay taxes of 1881, and all subsequent years.

In case the second party, his legal representatives or assigns, shall pay the several sums of money aforesaid punctually, and at the times above limited, and shall strictly perform all and singular the agreements and stipulations aforesaid after their true tenor and intent, then the said first party covenant and agree to make and execute unto the said second party, his heirs or assigns (upon request and surrender of this contract), a deed conveying said land in fee simple, with the ordinary covenants of warranty—reserving and excepting the right of way that may be demanded for public use for railways or common roads;—and it is hereby agreed and covenanted by the parties hereto that time and punctuality are material and essential ingredients in this contract.

And in case the second party shall fail to pay the taxes, or if the land shall be sold for taxes, or if said second party shall fail to make the payments of money for principal or interest, or to make improvements as herein agreed, upon the terms and at the times herein limited, and to perform and complete all and each of the payments, agreements and stipulations herein mentioned, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become null and void, and all the rights and interests hereby created or then existing in favor of the said second party or derived from him shall utterly cease and determine, and the right of possession and all equitable and legal interests in the premises shall revert to and revest in said first party without any declaration or forfeiture, or any act of re-entry, or any other act of said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed. And

in case of the forfeiture or annulling of this contract, the said second party shall still be bound and liable to pay all taxes then due or assessed against said land, also all installments of principal or interest that may then be due on this contract to be regarded and considered as rent for the use of
365 said land. Also no fixtures or improvements, temporary or permanent, shall be removed from said land.

And the said first party shall have the right, immediately upon the failure of the second party to comply with the stipulations herein to enter upon the land aforesaid, and take immediate possession thereof, together with all the fixtures, privileges and appurtenances thereon or in any wise thereunto belonging or appertaining. And the said second party hereby covenants and agrees to surrender unto the said first party, or his order or assigns, the said land and appurtenances without delay or hindrance; and no court shall relieve the said second party from a failure to comply strictly and literally with this contract, and this instrument shall not be regarded or construed as color of title.

No modification or change of this contract can be made except by entry hereon in writing, signed by both parties. An oversight or omission of the first party to take notice of any default of the second party shall not be deemed a waiver of their right so to do at any time thereafter.

And it is further stipulated that no assignment of the premises, or of this contract, shall be valid unless with the written consent of the first party, and by indorsement of the assignment hereon.

Time is hereby declared by the parties hereto to be the essence of this contract, and a failure on the part of the second party to make the payments mentioned, to do and perform all the covenants, to comply with all the agreements herein expressed, and by him agreed to be performed strictly according to the terms, boundaries and [limites] of time herein mentioned, or either or any of them, fully and completely, shall immediately work forfeiture of all the right and claim of the said party of the second part to have a conveyance of the land herein mentioned.

And in case of default the said second party binds himself and representatives to give up immediate possession of all said tract of land whenever a demand is made therefor by the said party of the first part or their legal repre-
366 sentatives.

And upon the non-performance of the covenants herein mentioned, or a failure to make the payments as herein

specified, or any of them, at the time promised, all the rights and privileges provided in this contract, giving to said second party the right to purchase the land mentioned, shall immediately terminate. The rights of the second party hereunder shall be the rights of a tenant, and he shall hold the land under this contract as a Lease, and he shall be liable and subject as a tenant under the statute regulating the relations between landlord and tenant; and in case of default, the first party may enforce the provisions of this contract, and also recover possession of the land, with all the fixtures, privileges, crops and appurtenances thereon; and in case of default, the action of forcible detainer shall lie against said party of the second part or his legal representatives herein.

In testimony whereof, the said party of the first part has signed these presents in duplicate, and the second party has hereunto set his signature, the day of the date hereof.

JOHN A. WISHERD.

In presence of
E. A. PINERO.

State of Nebraska,
Johnson County—ss.

On this second day of July, A. D. 1881, before me E. A. Pinero, a Notary Public in and for said County, personally appeared John A. Wisherd, well known to me to be the identical person, who signed the foregoing contract, and he acknowledged the same to be his voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal on the date last aforesaid.

[Seal] E. A. PINERO,
Notary Public.

367 EXHIBIT "B."

E. L. R.
Tecumseh, Neb. May 28th, 1884.

P. D. Cheney, Esq.
Atchison, Kan.

Dear Sir: We enclose herewith our 50029 on Chicago $350. as requested in yours of 26th, and charge same to your account.

We have no word from J. A. Wisherd.

Have this day received from J. Libby $1306.40 to pay 2 notes to P. D. C. due to-day.

Please send in the Libby notes as soon as practicable and we will credit same to your a/c.

Yours truly,
RUSSELL & HOLMES.

Exhibit "B" introduced in evidence on behalf of respondent Cheny, on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

EXHIBIT "C".
E. L. R.
(Copy) " ".

P. D. Cheney,
Jerseyville,
Illinois.

June 16th, 1884.

John A. Wisherd, Esq.,

Dear Sir: My contract of May 2d. 1881 to sell you,

All Section..... 1. 5. 7.
" .....24. 6. 7.
" ..... 9. 6. 8.
N. E. 1/4..... 5. 5. 7.
fractional W. 1/2 ..... 6. 5. 8.

a total of 2215 37/100 acres in Gage County, Nebraska,
368 became null and void and was terminated by your failure to pay the installments due May 2d. 1884,

I of $1886.73
I of 905.63

I will return the unpaid promissory notes on demand or will deposit them for your use and benefit with any third person you will name.

I also ask and demand possession of the land and the stipulated sum of $2792. 37/100 as the yearly rent of same.

Yours truly,
P. D. CHENEY.

Exhibit "C" introduced in evidence on behalf of respondent Cheney, on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

EXHIBIT "D".

E. L. R.

(Copy)

P. D. Cheney,
Jerseyville,
Illinois.

July 14th, 1884.

John A. Wisherd,
Dawson, Nodaway Co. Mo.

Dear Sir: Enclosed I return to you 16 notes, all dated May 2d. 1881, given to me by you as a part of the land contract of same date for the sale and purchase of,

All Section..... 1. 5. 7.
" .....24. 6. 7.
" ..... 9. 6. 8.
N. E. 1/4..... 5. 5. 7.
Fract'l W. 1/2..... 6. 5. 8.

being 2215 21/100 acres in Gage County, Nebraska.

As you know, the Contract of Sale became null and void was terminated and ended by your failure to comply with its terms—I have been unable until now to know with cer-
369 tainty your proper address or I would have returned the notes sooner.

Yours truly,

P. D. CHENEY.

Exhibit "D" introduced in evidence on behalf of respondent Cheny, on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

EXHIBIT "E".

E. L. R.

Russell & Holmes,
Bankers.
Tecumseh, Neb. May 18th, 1885.

P. D. Cheney, Esq.
Jerseyville.

Dear Sir: J. A. Wisherd called at our Bank to-day and demanded his notes which are now due and offered to pay the amount now due—made a tender of $5,785.00 for that purpose. As the notes are not in our possession he has withdrawn the money and desires us to say to you that he will deposit the amount stated in First Nat'l. Bank of Lincoln, Neb. with instructions to pay same to you or your attorneys on demand and that he will pay the balance due you under the contract at any time that you will give him 30 days notice.

Yours truly,

RUSSELL & HOLMES.

Exhibit "E" introduced in evidence on behalf of respondent Cheney, on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

370 EXHIBIT "F".
E. L. R.

P. D. Cheney,
Jerseyville,
Illinois.

Oct. 7th, 1890.

John A. Wisherd, Esq.
Dawson, Nodaway Co. Mo.

Sir: In consequence of your neglect and refusal to pay the amount due on the 14 enclosed past due notes given in connection with your land Contract of May 2d. 1881, I herewith return to you the 16 unpaid notes being the 14 past due & 2 due on May 2/91, and declare the Contract on my part to sell you the land, terminated and ended and I demand of you the immediate possession of the land referred to.

Yours truly,

P. D. CHENEY.

Registered at St. Louis, Mo. Oct. 9/90.

Exhibit "F" introduced in evidence on behalf of respondent Cheney, on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

EXHIBIT "G".
E. L. R.

P. D. Cheney,
Jerseyville,
Illinois.

December 30th, 1890.

John A. Wisherd, Esq.
Quitman, Mo.

Dear Sir: In consequence of your default and refusal to pay the amount due on the 14 enclosed past due notes given in connection with your land Contract of May 2d. 1881, I herewith return to you the 16 unpaid notes, being the 14 past due and the 2 due on May 2/91, and I declare the Contract
371 on my part to sell to you the land, terminated and ended and I demand of you the immediate possession of the land embraced in the Contract referred to.

Yours truly,

P. D. CHENEY.

I have heretofore sent these same notes to you,
at Adams, Neb.
at Lincoln, Neb.
at Dawson, Mo. but they were returned to me not delivered; I have just learned that you are now at Quitman, Mo.

Exhibit "G" introduced in evidence on behalf of respondent Cheney, on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

EXHIBIT "H".

E. L. R.

Return to P. D. Cheney, Jerseyville, Ill., If not delivered within five days.	United States 10 Postage 10 Ten cents.	United States 2 Postage 2 Two cents.	United States Postage Two)2(cents
	Registered		
Returned to writer. ~~167~~, ~~5¢~~	~~John A. Wisherd, Esq.~~ Ford.		
Jerseyville, Ill. Dec 311890 Registered.		Jerseyville, Ill.	
	~~Quitman~~		
		~~Tecumseh, Neb.~~	
		~~H. c.~~	
	~~C/f Bob Sabin.~~		

Exhibit "H" introduced in evidence on behalf of respondent Cheney, on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

372 EXHIBIT "I".

E. L. R.

C. A. Holmes, President. Chas. McCrosky, Vice-President. W. H. Holmes, Cashier.

No. 4276.

Tecumseh National Bank.

Successor to Bank of Russell & Holmes.

Tecumseh, Neb. May 17, 1890.

C. A. Holmes, Esq.

Prest. Tecumseh, Neb.

Dear Sir: Herewith I hand you for colln. & my Cr. 14 past due notes of J. A. Wisherd, all dated May 2/81, viz:

No. 3488	due	May	2/90	$1886.73
3489	"	"	2/89	1886.73
3490	"	"	2/88	1886.73
3491	"	"	2/87	1886.73
3492	"	"	2/86	1886.73
3493	"	"	2/85	1886.73
3494	"	"	2/84	1886.73
3496	"	"	2/90	226.43
3497	"	"	2/89	339.63
3498	"	"	2/88	452.83
3499	"	"	2/87	566.03
3500	"	"	2/86	679.23
3501	"	"	2/85	792.43
3502	"	"	2/84	905.63

all drawing ten per cent interest after due.

If Mr. Wisherd will pay same you will please receive payment therefor for me.

Mr. Wisherd to pay the full amount of principal and ten per cent interest on each of the 14 notes, according to their terms.

You will not receive any part payment on the notes
373 or on any of them.

I require full payment of all the notes.

Yours truly,

P. D. CHENEY,
of Jerseyville, Ill.

493.

Exhibit "I" introduced in evidence on behalf of respondent Cheney, on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

EXHIBIT "J."

E. L. R.

C. A. Holmes, President. Chas. McCrosky. Vice-President. W. H. Holmes, Cashier.

No. 4276.

Tecumseh National Bank.

Successor to Bank of Russell & Holmes.

Tecumseh, Neb., May 17, 1890.

John A. Wisherd, Esq.,
Adams, Neb.

Dear Sir: [Your] are hereby notified that I have this day left at this Bank your 14 past due notes, which you can get by paying the amount due thereon within a reasonable time.

Yours truly,

P. D. CHENEY.

Exhibit "J" introduced in evidence on behalf of respondent Cheney, on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

374 EXHIBIT "K."

E. L. R.

C. A. Holmes, President. Chas. McCrosky, Vice-President. W. H. Holmes, Cashier.

No. 4276.

Tecumseh National Bank,

Successor to Bank of Russell & Holmes.

Tecumseh, Neb., May 29, 1890.

P. D. Cheney, Esq.,
Jerseyville, Ill.

Dear Sir: At 4 o'clock this afternoon the Cashier of the First National Bank of Lincoln, Neb. called at this Bank and offered to pay the 14 notes of J. A. Wisherd, which you left here for collection May 17, 1890: that is, he made a tender of $17,512.00 and demanded the notes, claiming that was the amount Mr. Wisherd instructed him to tender and to pay the same upon surrender of the notes, as the amount is not sufficient to cover the principal and interest, we declined to surrender the notes or accept the money in payment of them and hold the notes subject to your further instructions.

Yours truly,

C. A. HOLMES, Pt.

Exhibit "K" introduced in evidence on behalf of respondent Cheney, on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

EXHIBIT "L."

Know All Men by These Presents:

That, I Prentiss D. Cheney, with my wife Annette H. Cheney of the County of Jersey, and State of Illinois for and in consideration of the sum of Fifteen Thousand Five Hundred and Six 47/100 dollars in hand paid do hereby grant, bargain, sell, convey and confirm unto John A. Wisherd of the County of Nodaway, and State of Missouri, the following described
375 real estate, situated in Gage County and State of..... to-wit:

The fractional west half of section six, town five north range eight east of the sixth principal meridian, being in acres	124.51
The north east quarter sect. five, town five, range seven, being	164.42
All section twenty-four, town six, range seven, being	640.00
All section nine, town six, range eight, being	640.00
All section one, town five, range seven, being	646.28
In acres a total of	2215.21

Said Cheney warrants against taxes of 1880 and all years prior thereto.

Said Wisherd has agreed to pay taxes of 1881, and all subsequent years.

This deed is executed in fulfillment of a Contract dated May 2d. 1881, wherein said P. D. Cheney agreed to convey said described land to said Wisherd, excepting and reserving the right of way that might be demanded for public use for railways and common roads, and I do hereby covenant with the said John A. Wisherd and his heirs and assigns, that I am lawfully seized of said premises; that they are free from incumbrance, that I have good right and lawful authority to sell the same; and I do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said Annette H. Cheney, wife of said P. D. Cheney, hereby relinquishes all her right of dower & homestead in and to the above described premises.

Signed this twenty-ninth day of April, A. D. 1891.

PRENTISS D. CHENEY,
ANNETTE H. CHENEY.

In presence of
A. M. SLATEN.

376 The State of Illinois,
Jersey County—ss.

On this twenty-ninth day of April, A. D. 1891, before me, Allen M. Slaten, a Notary Public, duly commissioned and qualified for and residing in said County, personally came Prentiss D. Cheney and his wife Annette H. Cheney to me known to be the identical persons described in and who executed the foregoing conveyance as grantors and acknowledged the said instrument to be their voluntary act and deed.

Witness my hand and official seal the day and year last above written.

[Seal] ALLEN M. SLATEN,
Notary Public.

My commission expires July 2d. 1895.

EXHIBIT "M."
E. L. R.

(Copy.)

No. 4276.

C. A. Holmes, President. Chas. McCrosky, Vice-President. G. D. Bennett, Cashier.

Tecumseh National Bank,
(Successor to Bank of Russell & Holmes.)

Tecumseh, Neb., May 2d. 1891.

O. Callihan, Esq.,
Cashier.

Dear Sir: We decline to accept the tender this day made by you of $19,512.00 for J. A. Wisherd to pay certain notes given to P. D. Cheney under contract for sale [—] lands, for the reason that we are not authorized by P. D. Cheney to accept the money nor have we the notes in our possession nor the deed to the premises for which notes are claimed to have been given.

Respectfully,
RUSSELL & HOLMES,
By C. A. HOLMES.

377 Exhibit "M" introduced in evidence on behalf of respondent Cheney on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

EXHIBIT "N."

E. L. R.

No. 4276.

C. A. Holmes, President. Chas. McCrosky, Vice-President. G. D. Bennett, Cashier.

Tecumseh National Bank,
(Successor to Bank of Russell & Holmes.)

Tecumseh, Neb. May 2d. 1891.

P. D. Cheney, Esq.,
Jerseyville, Ill.

Dear Sir: The Cashier of the First Nat'l Bank of Lincoln, Neb. has this day made a [temder] of ($19,512.00) Nineteen thousand, five hundred and twelve dollars for J. A. Wisherd to pay certain notes described in a contract dated May 2d. 1881, between you and said Wisherd—demanded the notes and a deed to the lands described in the contract—The tender and demand was made to and of me as one of the firm of Russell & Holmes and also as an officer of this Bank.

Yours truly,

C. A. HOLMES, Pt.

Exhibit "N" introduced in evidence on behalf of respondent Cheney, on Feb. 26/95.

EVELYN L. REYNOLDS.

EXHIBIT "O."

E. L. R.

William V. Allen. Willis E. Reed.

John S. Robinson.
Allen, Robinson & Reed.
Law Offices.
Stuart's Bank Building.

Madison, Nebraska, May 13th, 1891.

P. D. Cheney,
Jerseyville, Illinois.

378 Dear Sir: Yesterday the father of Mr. John A. Wisherd who, in the absence of the latter is delegated to attend to ordinary matters for him, such as getting and forwarding his mail and the like, got from the express office at Clarkson, in this State, an express package containing sixteen notes made by John A. Wisherd to you and payable at the office of Russell and Holmes, Tecumseh, Nebraska. The package was sent from Lincoln in this State, but knowing your home to be in Jerseyville, Illinois and believing you was when the package was sent, temporarily in Lincoln, we address you at your home, and inform you that said notes have this day been sent to Russell & Holmes by registered letter, at Tecumseh, Neb.

where they appear to be payable. We do this at the suggestion of Mr. Wisherd's father.

Mr. Wisherd is not in this State and will not be for many months.

It will be useless for you to return these notes to Mr. Wisherd again as they will not be taken from the office. We know of course, nothing as to the truthfulness or falsity of what you state in your letter of the 6th instant accompanying said notes.

Truly,

ALLEN, ROBINSON & REED.

Exhibit "O" introduced in evidence on behalf of respondent Cheney, on Feb. 26/95.

EVELYN L. REYNOLDS,
Notary Public.

NOTICE.

In the Circuit Court of the United States, for the District of Nebraska.

John S. Bilby, Plaintiff,
versus,
Prentiss D. Cheney, et al. Defendants.

DEPOSITION DE BENE ESSE.

Please take notice that the deposition de bene esse of Prentiss D. Cheney, A. W. Cross, Edward Cross, A. H. Cochran will be taken, to be read in evidence at the trial of said cause,
379 on the part of the respondent Cheney therein, before competent authority, at the office of F. Ferns, in Jerseyville, in the County of Jersey and State of Illinois, commencing on the 26th day of February, 1895, at the hour of 9 o'clock in the forenoon of said day, with authority to adjourn from day to day, till all such depositions shall have been completed, at which time and place you are hereby notified to be present and put interrogatories to the said witnesses, if you shall think fit.

The reason for taking the deposition is that said witnesses live at a greater distance than one hundred miles from Lincoln, Nebraska, the place of trial of this action.

Dated at Lincoln, this 18th day of February, 1895.

CHARLES E. MAGOON,
Solicitor for respondent Cheney.

To John S. Bilby,
Complainant.

Indorsed: Recd. this notice, February 20, 1895, and on same day served a true copy of this notice, on Robert W. Sabin, at-

torney for complainant. Personally all done in Gage County, Nebraska.

Witness my hand this 20th day of February, 1895.

H. SAVAGE, Constable.

Fees.

Service	.50
Copy	.25
Mileage	.10
	.85

United States of America,
State of Illinois,
County of Jersey—ss.

I, Evelyn L. Reynolds, a Notary Public, in and for said County and State aforesaid, duly appointed commissioned and qualified, and by the laws of the United States authorized and empowered to take depositions to be used in causes pending in the Circuit Court of the United States, do hereby
380 certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of the said witnesses is material and necessary for the respondent in the cause in the caption of the said deposition named, and that the said witnesses live and did live at the time of taking said deposition in Jerseyville in the State of Illinois, the same being at a greater distance than one hundred miles from Omaha, in the State of Nebraska, the place of the trial of said cause, to-wit: more than 500 miles therefrom.

I further certify that as appears by the notice hereto attached, due notice of the time and place of taking the said deposition, and the names of the witnesses to be examined were given.

I further certify that on the 26th day of February, A. D. 1895, at the hour of nine o'clock in the forenoon, I was attended at the office of F. Ferns, in Jerseyville, in the County of Jersey, in the State of Illinois, aforesaid, by R. W. Sabin, attorney for complainant and by C. E. Magoon, attorney for respondent, and the witnesses P. D. Cheney and A. W. Cross of sound mind and lawful age, and the said witnesses were by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing, in the presence of the witnesses and from their statements, and after carefully reading the same to the witnesses they subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same with this certificate of the reasons aforesaid for taking said deposition with my own hand to the Court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition and caption named, or in any way interested in the event of the said cause named in said caption.

381 In testimony whereof, I have hereunto set my hand and official seal, this 26th day of February, A. D. 1895.

[Seal] EVELYN L. REYNOLDS,
Notary Public.

Fees of Officer.

Taking and certifying depositions	$15.60
Administering oath to witness, 10 cents each	.20
Filing exhibits, 10 cents each	2.00
Fees paid witnesses, $1.50 per day .....1.	1.50
Postage	.25
	$19.55

Same were paid by P. D. Cheney, respondent.

EVELYN L. REYNOLDS,
Notary Public.

Upon the back of said Depositions appear indorsements in the words and figures following, to-wit: No. 270 P. Rec'd. & filed Mch. 4/95, and opened by order of Court, Apr. 1, 1895. Elmer D. Frank, Clerk.

Thereupon afterwards, to-wit: on the 14th day of March, 1895, a Deposition on behalf of respondent was filed in said case, which said Deposition is in the words and figures following, to-wit:

In the Circuit Court of the United States, for the District of Nebraska.

DEPOSITION DE BENE ESSE.

John S. Bilby, Plaintiff,
versus,
Prentiss D. Cheney, Deft. and Susan B. Alden, Admtx. &c., Cross-Complainant.

Please take notice that the deposition de bene esse of Chas. A. Pierce will be taken, to be read in evidence at the trial

of said cause, on the part of the respondent, Cheney, therein, before competent authority, at the office of The Tecumseh National Bank, in Tecumseh, in the County of Johnson and State of Nebraska, commencing on the 9th day of [day of]
382 March, 1895, at the hour of two o'clock in the afternoon of said day, with authority to adjourn from day to day, till all such depositions shall have been completed, at which time and place you are hereby notified to be present and to put interrogatories to the said witness, if you shall think fit.

The reason for taking the deposition is that said witness lives at a greater distance than one hundred miles from Omaha, Nebraska, the place of the trial of this action.

Dated at Lincoln, this 7th day of March, 1895.

CHAS. E. MAGOON,
Solicitor for Respondent.

To John S. Bilby,
Complainant.

Service of the above notice by receiving a copy thereof, on this 7th day of March, 1895, is admitted.

.....

Upon the back of said Notice, appear indorsements in words and figures as follows, to-wit:

State of Nebraska,
County of Gage—ss.

March 7th, 1895, received this writ and on the same day I served a true and certified copy hereof personally on Robert W. Sabin, Attorney of record for John S. Bilby, plaintiff herein. All done in Gage County, Neb.

Witness my hand this 7th day of March, 1895.

ROBERT KYD, Sheriff.
By R. R. KYD, Deputy.

Service	.50
Copy	.25
Mileage	.10
	$ .85

Depositions of witness taken before me, Clarence E. Smith, a notary public duly commissioned in and for Johnson County, in the State of Nebraska, on the 9th day of March, in the [yaer], 1895, between the hours of 2 o'clock P. M. and 4 o'clock P. M. at Tecumseh, in said County, pursuant to the annexed notice

to be read in evidence in behalf of the respondent in an action pending in the Circuit Court of the United States for the District of Nebraska, in which John S. Bilby is plaintiff and Prentiss D. Cheney is defendant and Susan B. Alden, admtx. is cross-complainant.

Chas. A. Pierce, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

Examined in Chief

By Mr. Magoon:

1 Q. State your name and place of residence?

A. Charles A. Pierce, Tecumseh, Nebraska.

383 2 Q. Have you in your custody, care or possession the collection register of the former banking house of Russell & Holmes?

A. I have what purports to be that. Of course I have no knowledge as to the records except what Mr. Holmes told me. He left some papers and books that belonged to the old firm of Russell & Holmes and asked us to keep them here in order to save him the trouble of keeping them.

3 Q. What is your connection with the Tecumseh National Bank?

A. Cashier.

4 Q. What connection has the Tecumseh National Bank with the banking house formerly known as the Bank of Russell & Holmes?

A. None whatever.

5 Q. Is it a successor to the banking house of Russell & Holmes?

A. Well, that is a point that is in litigation now. Some people are trying to make us out as the successors to the bank of Russell & Holmes. We do business in the same building, but we do not claim to be their successors.

6 Q. Will you produce the collection register, which was left here by Mr. Holmes?

A. There are several—

7 Q. The one covering this period, if you have such a register.

A. This register seems to cover the period from 1880 to 1884.

8 Q. Is this the collection register of Russell & Holmes for that period?

A. I presume it is. Mr. Holmes left it here with that statement. It is labeled on the back, "Collection Register 3, R. & H.-

9 Q. Calling your attention to the pages in said book, I will ask you to state how they are headed?

A. "Collection Register, Russell & Holmes."

10 Q. Directing your attention to page 108, I will ask you to state what if any entries appear thereon relative to the receipt of a note of J. A. Wisherd to P. D. Cheney under date of May 5, 1883?

384 Objected to by complainant as incompetent, irrelevant and immaterial.

A. There is an entry here. Appears to be a note of J. A. Wisherd given to P. D. Cheney; received by Russell & Holmes May 5, 1883, from the First National Bank of Jerseyville, Illinois.

11 Q. Please give the number of said note.

A. 17480.

12 Q. You may state whether or not said collection register shows whether said note has been paid?

A. Yes, sir.

Objected to by complainant as incompetent, irrelevant and immaterial.

13 Q. State when the said collection register shows said note was paid?

Objected to by complainant as incompetent, irrelevant and immaterial.

A. Well, it appears to have been remitted on the 22nd day of May, 1883.

14 Q. What was the amount?

A. $907.50.

Respondent Cheney offers in evidence the line on said collection register at which said entries appear, being the line commencing 5 17480, followed by the name J. A. Wisherd, Marked Exhibit "B."

Complainant objects as incompetent, irrelevant and immaterial.

15 Q. Can you permit this said collection register to be attached to your deposition—this deposition—and made a part thereof?

A. Well, I have no legal authority to let the book go out of my possession. I haven't any authority to keep it except a personal request. While it does not matter to me, I would rather not let it go, as I said before, as I have no legal authority to let it go.

16 Q. Will you allow a copy of said line in said col-
385 -ection register, including the said line and heading of said col-ection register and the main heading on the

page and the number of page, entry and line, offered in evidence to be made—to be attached to your deposition and made a part thereof?

A. Certainly, I have no objections to that.

17 Q. Who was the Mr. Holmes referred to as having left this collection register with you?

A. Charles A. Holmes, who was one of the firm of Russell & Holmes.

18 Q. Is he a resident of the State of Nebraska?

A. No, sir.

19 Q. Where does he reside?

A. I think in Oklahoma; North Enid, Oklahoma Territory. That is where he was the last time heard of him. I presume he is there yet.

20 Q. Have you the note referred to in said entry as Number 17480, a record of which appears on the said col-ection register in your custody and possession?

A. It was left here by Mr. Holmes. My attention was first called to it when the other depositions were being taken here in the case. Mr. Holmes'. It was left in the vault by his request.

21 Q. Whose request?

A. Mr. Holmes.

22 Q. What Mr. Holmes?

A. Mr. Charles A. Holmes.

23 Q. In your exhibit "A," I will ask you to state what it is? Whether or not it is the note referred to?

A. It is the note of J. A. Wisherd to P. D. Cheney, bearing the number Russell & Holmes, 17480, Tecumseh, Nebraska. I presume it is the note referred to in the collection register.

24 Q. Will you allow said note to be attached to and make a part of your deposition?

386 A. Well, I would prefer to keep the note. They were left here by request and I do not feel justified in letting them go.

25 Q. Are there any indorsements on said note, Exhibit "A"?

A. Yes, sir.

26 Q. What are they?

Objected to by complainant as not the best evidence as the note shows for itself.

A. 3503.

27 Q. What is that?

Objected to by complainant as incompetent, irrelevant and immaterial.

A. I do not know.

28 Q. Is it dollars?

A. Well, judging from—

Objected to by complainant as incompetent, irrelevant and immaterial.

A. I would presume it was Cheney's number. I do not know anything about it.

29 Q. Go on.

A. Received $262.35, Wisherd. Received $645.15 Bilby. Then both entries covered by a brace and following the brace, May 22/83. Under these two amounts a line has been drawn and added—$907.50. Following that: "Without recourse upon me in any event, P. D. Cheney." Pay Russell & Holmes or order for account of First National Bank, Jerseyville, Ill. A. W. Cross, cashier.

Complainant moves to strike out the evidence in regard to what the note shows as incompetent, irrelevant and immaterial and not the best evidence.

Respondent Cheney offers in evidence said note together with all the indorsements thereon. Marked Exhibit "A."

387 Complainant objects as incompetent, irrelevant and immaterial.

30 Q. How long have you been engaged in the banking business?

A. Since 1885.

31 Q. Are you familiar with the methods of doing business in the banks of Nebraska?

A. In country banks, yes, sir.

32 Q. Are you familiar with the methods of business of such a bank as the banking house of Russell & Holmes?

A. I think so.

33 Q. When, from your knowledge of the business and examination of the books of the banking house of Russell & Holmes, would you say this note was received by the banking house of Russell & Holmes?

Complainant objects as incompetent, irrelevant and immaterial.

A. It appears to have been received May 5, 1883.

Cross-Examination.

By R. W. Sabin:

34 Q. Mr. Pierce, you may state where you got this note, No. 17480?

A. Where I got it?

35 Q. Yes, sir.

A. Out of the vault in this bank.

36 Q. Was your attention called to it by Mr. Holmes?

A. Not specifically, except he is the only man—or is the first man that called my attention to it.

37 Q. Did he tell you in regard to why the note was here?

A. No, sir. He simply said it was not one of the sixteen notes referred to in that letter that I got the other time he was here.

38 Q. Did he not tell you at that time that this note was retained by Russell & Holmes because it was not quite paid?

A. Yes, sir.

39 Q. How much did he say was back on the note?

388 A. I do not know as he said. There is a pencil mark or figure on the back "Bal 240" which I presume is the amount he claimed is back. He did not say anything to me about what the amount was.

40 Q. Did he say that was the reason the note was retained?

A. Yes, sir.

41 Q. That note—or this note, I will say—was retained and was in the vault of your bank when you first discovered it?

A. It was retained by Mr. Holmes and left in our bank and my attention first called to it by Mr. Holmes. At his request it was left in the vault until he or some one else should call for it. I never knew anything about it.

42 Q. Please turn to page 70 of this same record, that is, this collection register. Do you find on that page any record of a note from John A. Wisherd to P. D. Cheney?

A. Yes, there is an entry here of such a note.

Complainant offers in evidence the line commencing with June 7—15560, John A. Wisherd, together with the printed headings of each division at the top of the page. Through all that line Exhibit C.

43 Q. Do you know the handwriting of this entry?

A. Yes, sir.

44 Q. Whose handwriting is it?

A. Mr. Holmes.

Re-Direct Examination.

By C. E. Magoon:

45 Q. Calling your attention to the line offered in evidence on page 108, do you know in whose handwriting that is?

A. Yes, sir.

46 Q. Charles A. Holmes.

Witness excused.

CHAS. A. PIERCE.

389 I, Clarence E. Smith, a notary public in and for Johnson County, do hereby certify, that Chas. A. Pierce was by me first duly sworn to testify the truth, the whole truth and nothing but the truth and that the deposition by him subscribed as above set forth was reduced to writing by A. N. True, who is not interested in the suit, in my presence and in the presence of the witnesses respectively, and was respectively subscribed in my presence by the said witness and was taken at the time and place in the annexed notice specified; that I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand and official seal this 9th day of March, 1895.

(Seal) CLARENCE E. SMITH,
Notary Public.

My commission expires Feb'y. 26, 1898.

Costs.

Swearing witness	$ .10
Certificate and seal	.25
Stenographers fees	5.50
C. A. Pierce, witness	2.00
	$7.85

Above costs paid by Deft. Cheney 3/13/95.

Said Exhibits referred to in said Depositions are in the words and figures following, to-wit:

EXHIBIT "A."

$905.63 Tecumseh, Nebraska, May 2d, 1881.

Two years after date for value received, I promise to pay to the order of P. D. Cheney, Nine hundred & Five & 63/100 dollars, payable at the office of Russell & Holmes, without interest before due; with ten per cent. per annum after maturity.

J. A. WISHERD.

Russell & Holmes,
No. 17480.
Tecumseh, Nebraska.

390 Indorsed on the back as follows:
Recd. $262.35 Wisherd)
" 645.15 Bilby) May 22/83.

907.50

Bal. 2.40. Without recourse on me in any event—P. D. Cheney. Pay Russell & Holmes or order for account of First National Bank, Jerseyville, Ill.—A. W. Cross, Cash.

EXHIBIT "B."

108. Collection Register. Russell & Holmes.

(When received, 1883) May 5. (Our Number) 17480. (Payer) J. A. Wisherd. (Drawer or indorser) P. D. Cheney. (Of whom received) First National Bank. (Address) Jerseyville, Ill. (Date) of letter, 1883) Apr. 30. (Their number) 3503. (Protest or no protest) No. (Date) May 2, 81. (Time) Two years. (When due) May 5/83. (Amount) 905.63. (Interest or exchange) 1.50. (Date of notice) May 5, 83. (Remarks) 10 per cent after due. 44687.
$907.50. 5/22/83.

EXHIBIT "C."

70. Collection Register. Russell " Holmes.

(When received) June 7. (Our number) 15560. (Payer) John A. Wisherd. (Drawer or indorser) P. D. Cheney. (Of whom received) P. D. Cheney. (Address) Jerseyville, (date of letter) June 5, 82. (Their number) 3504. (Protest or no protest) No. (date) May 2/81. (Time) 1 yr. (When due) May 2/82. (Amount) 905.63. (Interest or exchange) 913.90 cr. 6/7/82. (date of notice) June 7, 1882. (Remarks) 10 per cent after due.

Upon the back of said Deposition appear indorsements in the words and figures following, to-wit: No. 270 P. Rec'd. & filed Mch. 14, 1895, and opened by order of Court April 1, 1895. Elmer D. Frank, Clerk.

Thereupon afterwards, to-wit: on the 18th day of March, 1895, a Deposition on behalf of respondent was filed in said case, which said Deposition is in the words and figures following, to-wit:

391 DEPOSITIONS DE BENE ESSE.

United States of America,
State of Illinois,
County of Jersey—ss.

Be it remembered that on this 15th day of March, A. D. 1895, I, Evelyn L. Reynolds, notary public in and for the aforesaid County and State, appointed, duly commissioned and qualified, and by the laws of the United States authorized and empowered to take depositions in causes pending in the Circuit Court of the United States, did call and cause to be and personally appear before me at the office of F. Ferns in Jerseyville, in the County of Jersey, in the State of Illinois, Prentiss D. Cheney, to testify and the truth to say on the part and behalf of the respondent in a certain suit or matter of con-

troversy now depending and undetermined in the Circuit Court of the United States for the District of Nebraska, at Omaha, in the State of Nebraska, wherein John S. Bilby is plaintiff, and Prentiss D. Cheney is defendant.

And the said Prentiss D. Cheney being about the age of 58 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Prentiss D. Cheney and he did thereupon depose, testify and says as follows, viz.:

Prentiss D. Cheney, being first duly sworn, on oath, testified as follows:

Examined.

By Mr. Ferns:

(No appearance for Complainant.)

Q 1. Are you the Prentiss D. Cheney, who is the defendant herein, and whose deposition has already been taken herein?

Answer. I am.

Q 2. Have you a copy of the letter of date May 6th, 1891, sent from Lincoln Nebraska, to John A. Wisherd at Clarkson, Nebraska, enclosing to him the sixteen unpaid notes described in the contract involved herein?

Answer. I have a copy of said letter.

392 Q 3. State how this came to be in existence and why you did not produce it at the taking of your deposition heretofore made in this action?

Answer. The letter was written in the office of Mason and Whedon, in Lincoln, Nebraska, on May 6th, 1891, and was copied in the letter press copy book of Mason and Whedon, where it has remained ever since until now. I did not take the steps to produce the copy of the letter when my deposition was taken a few days ago, because I was not then aware that it would be called for. The original letter was sent from Lincoln, Nebraska, with the sixteen unpaid notes by express, to John A. Wisherd at Clarkson, Nebraska.

Q. 4. Is this a true and correct copy of said letter, and, if so, state what kind of a copy it is, and where and in what book it appears?

Answer. It is a true and correct copy of said letter; it is a letter press copy and was made in the letter press book of Mason & Whedon, as above stated.

Q 5. Whose signature is attached to this letter?

Answer. It is my signature, written by myself.

Q 6. Will you attach a copy of said letter to your deposition and make it a part thereof?

Answer. I will, and the same is done accordingly.

Q. 7. Referring to the note due May 5, 1883, and which you have testified you received the money thereon on May 24, 1883, I will ask you to state what, if any, knowledge you had regarding the whereabouts of said note, after you received the money thereon?

Answer. I had no knowledge whatever of the whereabouts of said note until November, 1894, when I was present when C. A. Holmes gave his deposition for complainant in this action, at Tecumseh, Nebraska. I personally went with said Holmes to the Tecumseh National Bank, and with Mr. Pierce, the cashier of said Bank, and with Mr. C. A. Holmes,
393 we examined a box of papers kept in the vault of said Bank, which were called the "Cheney papers," the same being a large bundle of letters, memoranda, old mortgages, releases, [ect.]. In examining said papers, we found therein the note of John A. Wisherd given to me, due in 1883, for $905.63. On the back of said note were entries made by Mr. Holmes of two payments to be credited on said note. Mr. Holmes then stated that the note had not been surrendered to Wisherd because there was a balance of Two or Three dollars interest due him on the note.

Q. 8. After you had received the sum of $906.00 on said note, what, if any, further claim did you make on said note?

Answer. I never made any further claim on said note.

Q. 9. Was the payment of $906.00 thereon a payment in full?

Answer. It was.

Q. 10. State whether or not you claimed that there was anything more due on said note, or if you made such a claim?

Answer. I do not claim and never have claimed that any more was due me on said note.

Q. 11. When did you first learn that said note had not been delivered to John A. Wisherd upon the payment thereof on May 22, 1883?

Answer. In November, 1894, when the deposition of C. A. Holmes was taken by complainant herein, as above stated.

Q. 12. What, if any, claim do you now possess or assert on said note?

Answer. None whatever.

Q. 13. How long since did you possess or assert or claim any right, title, or interest in and to the said note?

Answer. Not since May 24, 1883.

Q. 14. From whom and how did you receive the money for said note?

Answer. I received it from and through the First National Bank of Jerseyville, Illinois, in which bank I had deposited said note for collection about two weeks before it came due.

PRENTISS D. CHENEY.

394 COPY OF EXHIBIT "A".

Lincoln, Neb. May 6th, 1891.

John A. Wisherd,
Clarkson, Colfax Co. Nebr.

Dear Sir: In consequence of your default in paying two notes due 2d--5th of May, 1891, one note for..... 1886.73
and one for 113.23
And also your default in making payment of 14 notes,
One due May 5th, 1884, for..... 1886.73
and one note due May 5th, 1884, for..... 905.63
One note due May 5th, 1885..... 1886.73
One note due May 5th, 1885..... 792.43
One note due " " 1886..... 1886.73
One note due " " " 679.23
One note due May 5th, 1887..... 1886.73
One note due May 5th " 566.03
One note due May 5th, 1888..... 1886.73
One note due May 5th " 452.83
One note due May 5th, 1889..... 1886.73
One note due May 5th, " 339.63
One note due May 5th, 1890.....1886.73
One note due May 5th " 226.43
which notes were given by you to me in connection with my (contract) contract dated May 2d, 1881, relating to the following described land: All of section 1, town 5, range 7, all of section 24, town 6, range 7; all of section 9, town 6, range 8; the north-east quarter of section 5, town 5, range 7; the fractional west half of section 6, in town 5, range 8, being a total of 2215.21 acres all situated in Gage County, in the State of Nebraska. And also in consequence of your default in paying the taxes on the above described land and other de-
395 faults and violations of the terms and conditions of said contract, on your part to be done and performed, I have elected and hereby notify you, to that effect to declare said contract forfeited, terminated and ended and I hereby tender and return to you the above notes described on which you have defaulted and which now remain unpaid being all of the unpaid notes referred to and described in said contract. The said sixteen notes being enclosed herewith.

P. D. CHENEY."

In the Circuit Court of the United States, for the District of Nebraska.

DEPOSITION DE BENE ESSE.

John S. Bilby, Plaintiff,
versus
Prentiss D. Cheney, Defendant.

Please take notice that the deposition de bene esse of Prentiss D. Cheney, will be taken, to be read in evidence at the trial of said cause, on the part of defendant Cheney therein, before competent authority, at the office of F. Ferns, in Jerseyville, in the County of Jersey and State of Illinois, commencing on the 15th day of March, 1895, at the hour of 10 o'clock in the forenoon of said day, with authority to adjourn from day to day, till all such depositions shall have been completed, at which time and place you are hereby notified to be present and put interrogatories to the said witness, if you shall think fit.

The reason for taking the deposition is that said witness lives at a greater distance than one hundred miles from Lincoln, Nebraska, the place of trial of this action.

Dated at Lincoln this 12th day of March, 1895.

CHAS E. MAGOON,
Atty. for Deft. Cheney.

To John S. Bilby,
Complainant.

Service of the above notice by receiving a copy
396 thereof, on this 12 day of March, 1895, is admitted, but object that the time is not sufficient under the law to require complainant to appear at the taking of said deposition.

R. W. SABIN,
Solicitor for Complainant.

State of Nebraska,
Gage County—ss.

I, Robert Kyd, being first duly sworn on oath say, that on the 12th day of March, 1895, I served the attached notice for depositions in the case of John S. Bilby, vs. Prentiss D. Cheney, pending in the Circuit Court of the United States for the District of Nebraska, upon R. W. Sabin, attorney for complainant Bilby, by leaving with him a duplicate copy of the notice hereto attached.

ROBERT KYD.

Subscribed in my presence and sworn to before me this 12th day of March, 1895.

[Seal] R. W. LAFLIN, Clerk D. C.
By ORLANDO SWAIN, Deputy.

United States of America,
State of Illinois, County of Jersey—ss.

I, Evelyn L. Reynolds, a notary public in and for the aforesaid County and State, duly appointed, commissioned and qualified, and by the laws of the United States authorized and empowered to take depositions to be used in causes pending in the Circuit Courts of the United States, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of the said witness is material and necessary for the respondent in the cause in the caption of the said deposition named, and that the said witness lives and did live at the time of taking said deposition in Jerseyville, in the State of Illinois, the same being a greater distance than one hundred miles from Omaha, in the State of Nebraska, the place of trial of the said
397 cause, to-wit: more than 500 miles therefrom.

I further certify that as appears by the notice hereto attached, due notice of the time and place of taking the said deposition, and the names of the witnesses to be examined was given.

I further certify that on the 15th day of March, A. D. 1895, at the hour of two o'clock in the afternoon, I was attended at the office of F. Ferns, in Jerseyville, in the County of Jersey in the State of Illinois aforesaid, by F. Ferns, attorney for respondent, no appearances for complainant, and the witness, Prentiss D. Cheney of sound mind and lawful age, and the said witness was by me carefully examined and cautioned and sworn to testify the truth, the whole truth and nothing but the truth, and the deposition was by me reduced to writing, in the presence of the witness, and from his statements, and after carefully reading the same to the witness, he subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same with this certificate of the reasons aforesaid for taking said deposition with my own hand to the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition and caption

named or in any way interested in the event of the said cause named in said caption.

In testimony whereof, I have hereunto set my hand and official seal this 15th day of March, A. D. 1895.

[Seal] EVELYN L. REYNOLDS,
Notary Public.

Fees of Officer.

Taking and certifying depositions	$2.30
Administering oath to witness, 10 cents each	.10
Filing exhibits, 10 cents each	.10
Postage	.15
Same paid by Prentiss D. Cheney	$2.65

EVELYN L. REYNOLDS,

Upon the back of said Deposition appear indorsements in the words and figures following, to-wit: No. 270 P. Rec'd. & Filed Mch. 18, 1895, and opened by order of Court April 1, 1895, E. D. Frank, Clerk.

398 Thereupon afterwards, to-wit: at the January 1895 term of said Court and on the 18th day of March, 1895, the following proceedings were had and done [is] said case as appears of record on folio 497 of Journal T. of said Court, to-wit:

John S. Bilby,
No. 270 P. vs.
Prentiss D. Cheney.

On motion of the defendant by C. E. Magoon, his solicitor, leave is hereby granted by the Court to file Amended Answer herein in five days from this date; plaintiff is ruled to file Replication thereto in ten days from this date.

399 Thereupon afterwards, to-wit: on said 18th day of March 1895, an Amended Answer was filed in said case,

which said Amended Answer is in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

AMENDED ANSWER IN EQUITY OF THE DEFENDANT PRENTISS D. CHENEY.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, Defendant.

To the Honorable the Judges of the Circuit Court of the United States, within and for the District of Nebraska.

This defendant now and at all times hereinafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said bill of complaint contained for answer thereunto or unto so much and such parts thereof as this defendant is advised, is, or are material or necessary for him to make answer unto, this defendant answering sayeth, that he denies each and every allegation in said complainant's bill of complaint set forth, excepting such as are hereinafter expressly admitted to be true.

This defendant admits that the complainant John S. Bilby is a citizen and resident of Quitman, in the State of Missouri, and that this defendant Prentiss D. Cheney is a citizen and resident of Jerseyville, in the State of Illinois. Admits that the matters in controversy exceed in value the sum of Twenty thousand ($20,000) dollars, exclusive of interest and costs.

This defendant admits that heretofore and on or about the 2nd day of May in the year 1881, the said respondent Prentiss D. Cheney entered into a certain written contract with one John A. Wisherd.

2. This respondent further answering alleges that on or about the 2nd day of May, 1881, this respondent entered into a certain written contract with one John A. Wisherd,
400 whereby for a valuable consideration and the performance of certain conditions and covenants set forth in said contract and certain payments of money to be made as therein set forth, this said respondent agreed to sell to said John A. Wisherd certain real estate situate in Gage County

in the State of Nebraska, more particularly described as follows, to-wit:

All of section one, town five, range seven, being.....	646.28
All of section twenty-four, town six, range seven, being	640.
All of section nine, town six, range eight, being....	640.
North east quarter section five, town five, range seven, being.....	164.42
And the fractional west half of section six, town five, range eight, being.....	124.51
In acres a total of.....	2215.21

acres. That a copy of said written contract so entered into by and between this respondent and said John A. Wisherd is hereto attached and marked Exhibit "A" and made a part hereof and permission asked to refer thereto.

3. That by the terms and conditions of said contract John A. Wisherd agreed and obligated himself to pay to this respondent Prentiss D. Cheney the sum of Fifteen thousand dollars ($15,000) in annual payments of $1886.73 each, all of which payments were evidenced by eight certain promissory notes of even date with said contract and bearing interest at the rate of 10 per cent. per annum after maturity, made, executed and delivered by said John A. Wisherd to said Prentiss D. Cheney at the time of the execution and delivery of said contract, the first of said payments falling due three years from date and one of said notes maturing each year thereafter for a period of eight years inclusive of the first note.

That by the terms and conditions of said contract the said John A. Wisherd further agreed to pay to this respond-
401 ent Prentiss D. Cheney as interest on said $15,000, the following sums of money at the times specified.

$905.63	May	2—5th,	1882.
$905.63	"	"	1883.
$905.63	"	"	1884.
$792.43	"	"	1885.
$679.23	"	"	1886.
$566.03	"	"	1887.
$452.83	"	"	1888.
$339.63	"	"	1889.
$226.48	"	"	1890.
$113.23	"	"	1891.

That said payments so contracted for and agreed upon were further evidenced by ten certain promissory notes of even date with said contract, made, executed and delivered by said John A. Wisherd to this respondent Prentiss D. Cheney, and due one, two, three, four, five, six, seven, eight, nine, and ten years

from date and bearing interest at the rate of ten per cent. per annum from maturity.

That the said John A. Wisherd has defaulted and failed to perform the terms, conditions and obligations of said contract on his part to be done and performed in this, that he has neglected, failed and refused to make or pay the following payments required by the terms of said contract:

	$1886.73	due	May	2—5	1891,
	$133.23	"	"	"	1891.
	$1886.73	"	"	"	1890,
	$226.43	"	"	"	1890.
	$1886.73	"	"	"	1889,
	$339.63	"	"	"	1889.
	$1886.73	"	"	"	1888,
	$452.63	"	"	"	1888.
	$1886.73	"	"	"	1887,
	$566.03	"	"	"	1887.
402	$1886.73	due	May	2—5	1886,
	$679.23	"	"	"	1886.
	$1886.73	"	"	"	1885,
	$792.43	"	"	"	1885.
	$1886.73	"	"	"	1884,
	$905.63	"	"	"	1884.

That by reason of said default said contract became forfeited, null and void at the option of this respondent, Prentiss D. Cheney.

4. That immediately after each default in said payments by said John A. Wisherd, this respondent notified the said Wisherd that he elected to declare said contract void and did declare said contract forfeited and void and tendered back and returned to said Wisherd the unpaid notes of the said Wisherd evidencing the payments to be made on said contract.

That this respondent does now declare said contract forfeited, null and void.

5. This respondent further answering the complainant's said bill alleges that the pretended tenders of money in alleged compliance with the terms and conditions of said contract were not in good faith and were not bona fide tenders, but if any were made they were furtherance of the conspiracy between the said complainant and the said John A. Wisherd, which said conspiracy had for its object and was intended to cheat, swindle and defraud and deceive this respondent.

6. This respondent further answering says that said complainant ought not to have or maintain his alleged plea of tender of payment of the amount due under said contract at the time said payments became due for the reason that said complainant did not and has not kept good said pretended and alleged payments and did not and has not deposited said sums in any place or bank where this defendant could secure the same upon application therefor and has not set aside and did not keep set aside or separate and distinct moneys or funds at any time or any place where this defendant could secure the same in satisfaction of said payments so due and owing, and said complainant has not brought the amount of said
403 alleged tenders nor the amount of said payments so past due into Court and deposited the same in Court or elsewhere for the use and benefit of this defendant, or where this defendant might or could secure the same, and has made no tender or profert thereof of said sum or any sum in this Court or elsewhere for the use and benefit of this defendant.

7. This respondent further answering said complainant's said bill alleges that the complainant ought not to have and maintain this action for the reason that the complainant is without right or title either legal or equitable in and to the premises in controversy for the reason that heretofore and on or about the 24th day of March A. D. 1890, one Susan B. Alden, executrix of the estate of George C. Alden, deceased, recovered a judgment against said John A. Wisherd and one S. O. Wisherd, duly given by the District Court of the First Judicial District of Nebraska, held in and for Gage County, for the sum of $20,565.90 and $48.80 costs of suit in an action then pending in said Court in favor of the said Susan B. Alden, executrix of the estate of George C. Alden, deceased. That said judgment is now in full force, unsatisfied and unappealed from and is a first and prior lien on said premises, if the said John A. Wisherd or S. O. Wisherd, either or both, or if the said complainant herein John S. Bilby have any right title or interest in and to the premises involved in this controversy.

That the said Susan B. Alden, executrix as aforesaid has cause execution to be issued on said judgment and levied on said land and claims said property as subject to said execution.

8. That said pretended conveyance of the said contract from the said John A. Wisherd to the said John S. Bilby, if any such was made or attempted to be made, was done for the purpose and with the intent and in pursuance of a conspiracy to cheat swindle and defraud the creditors of the said John A.

Wisherd and more especially to cheat, swindle and defraud this respondent and to hinder and delay this respondent from the collection of his debts and the enforcement of his rights in the premises.

404 9. That by the terms and conditions of said contract hereto attached, and marked Exhibit "A," the said John A. Wisherd party of the second part agreed to regularly and seasonably pay all the taxes and assessments against said land, and to pay the taxes of 1881, and all subsequent years. And it was provided in said contract and agreement that in case said Wisherd the party of the second part should fail to pay the taxes or if the land should be sold for taxes then said contract should become null and void and all the rights and interest thereby created or then existing in favor of the said second party or derived from him, shall utterly cease and determine and the right of possession and all equitable and legal interests in the premises shall revert to and revest in said first party, to-wit: this respondent, without any declaration, forfeiture or act of re-entry or any other act of the said first party to be performed and without any right of said second party or reclamation of compensation. That in violation of said provisions of said contract the said Wisherd and the said Bilby allowed said land to be sold for taxes for the years 1887, 1888, 1889, 1890, 1891 and 1892.

And this respondent alleges that by reason of said failure to comply with said terms and said conditions of said contract, said contract has become null and void and without force or effect as against this respondent.

10. This respondent further answering said complainant's said bill alleges that all of said facts hereinbefore set forth regarding the conditions of said contract between this respondent and the said Wisherd and also the default made by the said Wisherd in the payments required by said contract and the forfeiting of said contract and the election and declaring of said contract forfeited, null and void by this respondent, and the tendering and giving back to said Wisherd of his said notes and said contract and relieving him from obligation thereunder, were well and truly known to the complainant John S. Bilby for a long time prior to the pretended purchase
405 by him and the assignment of said contract and of the pretended purchase by him of the alleged interest of the said John A. Wisherd in said land, and were well and fully known by said John S. Bilby long prior to the 13th day of February, 1889.

And your respondent further alleges that by reason of such knowledge the said John S. Bilby, complainant, is estopped

and ought not to have and maintain his alleged cause of action in his said bill of complaint set forth and by reason of such estoppel is not entitled to the relief prayed for in his said bill of complaint.

11. This respondent further answering the bill of complaint herein alleges that by the terms and conditions of said contract between this respondent and the said Wisherd it was stipulated that no assignment of the premises or of the said contract should be valid unless with the written consent of the first party, which said first party was the respondent herein, the said Prentiss D. Cheney, and by indorsement of the assignment of said contract. And this respondent alleges that he has never at any time consented to the assignment of the premises or of said contract to the said complainant John S. Bilby or any other person and that if said contract has been assigned or the said Wisherd's rights thereunder by the said John A. Wisherd to the said John S. Bilby or other person, it has been without the consent of this respondent.

12. This respondent further answering says that said pretended sale and assignment of said premises and contract hereinbefore referred to and the alleged rights of the said John A. Wisherd thereunder and thereto were made for the express purpose of cheating, swindling, hindering and delaying the creditors of the said John A. Wisherd in the collection of their debts due from the said John A. Wisherd, and more especially to cheat, swindle and defraud this respondent and hinder and delay this respondent from securing the possession of said premises, and that said pretended sale and conveyance were a fraud and null and void, all of which
406 was well and truly known to said John S. Bilby at the time and long prior to said pretended sale, assignment and transfer and the said John S. Bilby was a party to and knowingly participated in said fraud and fraudulent conveyance, and that the same was attempted in furtherance of a conspiracy to cheat, swindle and defraud this respondent, which said conspiracy was well known to and participated in by said John S. Bilby, complainant.

13. This respondent further answering said bill of complaint alleges that heretofore and after said defaults by the said John A. Wisherd and his pretended assignee the complainant herein John S. Bilby, and on or about the 6th day of May, 1891, this respondent returned and delivered said notes referred to in the contract hereto attached and made a part hereof, marked Exhibit "A" to said John A. Wisherd and notified him in writing that in consequence of said defaults in the payment of said notes and in paying the taxes on said

land and of other defaults and violations of the terms and conditions of said contract on his part to be done and performed that he, the said Cheney, thereby elected and thereby notified the said John A. Wisherd of his act and intention then and there declared said contract forfeited, terminated and ended, and this defendant did then and there and thereby declare said contract forfeited and notified said John A. Wisherd of such forfeiture in writing and returned to the said John A Wisherd said notes then past due and unpaid.

14. This respondent further says that by reason of the said Wisherd and said Bilby allowing said land to be sold for taxes for the year 1892, this respondent was compelled to redeem said land from said tax sale to the loss and damage of this defendant in the sum of $521.95, which amount this respondent paid to redeem said land from said tax sale on the 5th day of April, 1894.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the
407 said bill charged, without this, that there is any other matter, cause or thing, in said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided and denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays that said contract shall be declared forfeited, null and void, and that the respondent be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

CHAS. E. MAGOON,
Sol. for Respondent, Prentiss D. Cheney.

Indorsed.—No. 270 P. Circuit Court of the United States, for the District of Nebr. John S. Bilby, complainant, vs. Prentiss D. Cheney, defendant. Answer in Equity of the Defendant, Prentiss D. Cheney. Filed March, 18, 1895. E. D. Frank, Clerk.

EXHIBIT "A".

This indenture, made this 2nd day of May, in the year of our Lord one thousand eight hundred and eighty-one, between Prentiss D. Cheney of Jerseyville, Jersey County, Illinois, party of the first part and John A. Wisherd of Nodoway County, Missouri, party of the second part, Witnesseth:

That in consideration of the stipulations herein contained and the payments to be made as herein specified, the first party

doth by these presents demise and let to the second party the possession and use of the land herein mentioned to the said second party said premises, situate and being in the County of Gage, in the State of Nebraska, known and described as follows, to-wit:

All of section one, town five, range seven, being..... 646.28
All of section twenty-four, town six, range seven being. 640.
All of section nine, town six, range eight, being..640.
408 North east quarter sect. five, town five, range seven, being 164.42
Fractional west half sect. six, town five, range eight, being 124.51

In acres a total of.....2215.21

The sum agreed upon for the possession, use occupancy and control of said land is $2792.37/100, yearly, which is represented and included in the notes executed by said second party described herein, and also the whole amount of the taxes that are or may be assessed against said land. The purchase price of said land is Fifteen thousand five hundred & six & 47/100 dollars, of which payment has been made of Four hundred & twelve & 55/100 dollars, at the execution of this contract. The balance is to be paid, without notice or demand therefor, in ten annual payments, at the times specified in eighteen certain promissory notes, of even date herewith, signed by John A. Wisherd payable to the order of P. D. Cheney.

One note being for 1886.73/100 dollars, due three years after date.

One note being for 1886.73/100 dollars, due four years after date.

One note being for 1886.73/100, due five years after date, and five other notes for $1886.73/100 each due in six, seven, eight, nine and ten years after date, which eight are the principal notes the other ten notes being for the yearly interest, viz: first note, $905.63/100; second note, $905.63/100; third note $905.63/100; fourth note, $792.43/100; fifth note, $679.23/100; sixth note $566.03/100; seventh note, $452.83/100; eighth note, $339.63/100; ninth note, $226.43/100; tenth note, $113.23/100; due consecutively in one, two, three, four, five, six, seven, eight, nine and ten years after date, all payable at the office of Russell & Holmes in Tecumseh, Neb. without interest before due, and with ten per cent, per annum after maturity. And the said second party, in consideration of this agreement, hereby agrees to make punctual payment of the above sums of principal and interest as each of the same

respectively becomes due, and will also regularly and seasonably pay all the taxes and assessments against said land.

Wisherd contracts and agrees to break one third of
409 each of the five tracts described, in season of 1881.

Wisherd contracts and agrees to build six dwelling houses at proper points within one year from date, which dwelling houses shall be good and suitable for dwelling purposes and to cost not less than $250 each.

Cheney is to pay taxes of 1880 and to warrant against all former years taxes.

Wisherd is to pay taxes of 1881, and all subsequent years.

In case the second party, his legal representatives or assigns shall pay the several sums of money aforesaid punctually and at the times above limited, and shall strictly perform all and singular the agreements and stipulations aforesaid after their true tenor and intent, then the said first party covenant and agree to make and execute unto the said second party, his heirs or assigns (upon request and the surrender of this contract), a deed conveying said land in fee simple, with the ordinary covenants of warranty—reserving and excepting the right of way that may be demanded for public use for railways or common roads; and it is hereby agreed and covenanted by the parties hereto that time and punctuality are material and essential ingredients in this contract.

And in case the second party shall fail to pay the taxes, or if the land shall be sold for taxes, or if said second party shall fail to make the payments of money for principal or interest, or to make improvements as herein agreed, upon the terms and at the times herein limited and to perform and complete all and each of the payments, agreements and stipulations herein mentioned, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become null and void, and all the rights and interests hereby created or then existing in favor of the said second party or derived from him, shall utterly cease and determine, and the right of possession and all equitable and legal interests,in the premises shall revert to and revest in said
first party, without any declaration or forfeiture, or
410 any act of re-entry, or any other act of said first party
to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed. And in case of the forfeiture or the annulling of this contract, the said second party shall still be

bound and liable to pay all taxes then due or assessed against said land, also all installments of principal or interest that may then be due on this contract to be regarded and considered as rent for the use of said land. Also no fixtures or improvements, temporary or permanent, shall be removed from said land.

And the said first party shall have the right, immediately upon the failure of the second party to comply with the stipulations herein, to enter upon the land aforesaid and take immediate possession thereof, together with all the fixtures, privileges and appurtenances thereon or in any wise thereunto belonging or appertaining. And the said second party hereby covenants and agrees to surrender unto the said first party, or his order or his assigns, the said land and appurtenances without delay or hindrance; and no Court shall relieve the said second party from a failure to comply strictly and literally with this contract, and this instrument shall not be regarded or construed as color of title.

No modification or change of this contract can be made except by entry hereon in writing, signed by both parties. An oversight or omission of the first party to take notice of any default of the second party shall not be deemed a waiver of their right so to do at any time thereafter.

And it is further stipulated that no assignment of the premises, or of this contract, shall be valid unless with the written consent of the first party, and by the endorsement of the assignment hereon.

Time is hereby declared by the parties hereto to be the essence of this contract, and a failure on the part of the second party to make the payments mentioned, to do and perform all the covenants,
411 to comply with all the agreements herein expressed, and by him agreed to be performed strictly according to the terms, boundaries and limits of the time herein mentioned, or either or any of them, fully and completely, shall immediately work forfeiture of all the right and claim of the said party of the second part to have a conveyance of the land herein mentioned.

And in case of default the said second party binds himself and representatives to give up immediate possession of all said tract of land, whenever a demand is made therefor by the said party of the first part or their legal representatives. And upon the non-performance of the covenants herein mentioned or a failure to make the payments as herein specified, or any of them, at the time promised, all the rights and privileges pro-

vided in this contract, giving to said second party the right to purchase the land mentioned, shall immediately terminate.

The rights of the second party hereunder shall be the rights of a tenant, and he shall hold the land under this contract as a lease, and he shall be liable and subject as a tenant under the statute regulating the relations between landlord and tenant and in case of default, the first party may enforce the provisions of this contract, and also recover possession of the land with all the fixtures, privileges, crops and appurtenances thereon; and in case of default, the action of forcible detainer shall lie against said party of the second part or his legal representatives herein.

In testimony whereof, the said party of the first part has signed these presents in duplicate, and the second party has hereunto set his signature, the day of the date hereof.

JOHN A. WISHERD.

In presence of
E. A. PINERO.

State of Nebraska,
Johnson County—ss.

On this second day of July, A. D. 1881, before me, E. A. Pinero, a notary public in and for said county, personally appeared John A. Wisherd, well known to me to be the identical person, who signed the foregoing contract, and he acknowledged the same to be his voluntary act and deed for the uses and purposes therein set forth.

412

Witness my hand and official seal on the date last aforesaid.

[Seal] E. A. PINERO,
Notary Public.

Indorsed.—No. 270 P. John S. Bilby vs. Prentiss D. Cheney Answer. Filed Mch. 20, 1894. E. D. Frank, Clerk. Chas. E. Magoon, Solicitor.

Upon the back of said Amended Answer appear indorsements in the words and figures following, to-wit: 270 Doc. P. U. S. Circuit Court, District of Nebraska in Chancery. John S. Bilby vs. Prentiss D. Cheney, et al. Amended Answer of Respondent Cheney. Filed Mar. 18, 1895, Elmer D. Frank, Clerk.

Thereupon afterwards, to-wit: on the 20th day of March, 1895, a Stipulation was filed in said case, which said Stipulation is in the words and figures following, to-wit:

In the Circuit Court of the United States, District of Nebraska.

STIPULATION.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, Respondent and Susan B. Alden, Executrix, et al.

Now comes complainant and Susan B. Alden, executrix and interpleader and hereby stipulate and agree that the petition filed on May 18, 1889, in Gage County District Court, wherein Susan B. Alden executrix, was plaintiff against John A. Wisherd and S. O. Wisherd were defendants together with the supplemental petition filed in said District Court of Gage County, Nebraska, on September 21, 1889, wherein the said Susan B. Alden, executrix of the estate of George C. Alden, deceased, was plaintiff against John A. Wisherd and S. O. Wisherd, defendants, together with the answer filed in
413 the said District Court of Gage County, Nebraska, by John A. Wisherd and S. O. Wisherd, wherein they were said defendants and Susan B. Alden, executrix, etc. was plaintiff, on the 4th day of October, 1889, together with the reply filed by Susan B. Alden, executrix plaintiff, against John A. Wisherd and S. O. Wisherd, defendants, in said District Court of Gage County, Nebraska, filed on November 1st 1889; copies of which are hereto attached to this stipulation, marked exhibits "A. B. C. D." and made a part of this stipulation, can be used and read in evidence in behalf of the said Susan B. Alden, executrix and inter-pleader, subject to objection as incompetent, irrelevant and immaterial, and we hereby stipulate and agree that the same are true and correct copies of said pleadings filed in said case.

Witness our hands this 29 day of January, 1895.

R. W. SABIN,
Solicitor for Complainant.

Endorsed: In the Circuit Court of the United States, District of Nebraska. John S. Bilby, complainant, vs. Prentiss D. Cheney, respondent, and Susan B. Alden, Executrix, et al. Stipulation. Filed Mar. 20, 1895, Elmer D. Frank, Clerk.

In the District Court, Gage County, Nebraska.

PETITION.

Susan B. Alden, Executrix of the Estate of George C. Alden, deceased, Plaintiff.

vs.

John A. Wisherd and S. O. Wisherd, Defendants.

The plaintiff complians of the defendants for that on the 17th day of July, A. D. 1888, George C. Alden died, testate, in the County of Larimer, Colorado; that thereafter on the ....day of ...., A. D. 18.., the plaintiff was duly ap-
414 pointed executrix of the estate of said George C. Alden, deceased, by the Probate Court of said County and thereafter the said Susan B. Alden duly qualified as such executrix and ever since has been and now is the duly qualified and acting executrix of the estate of said George C. Alden, deceased.

1st. For a first cause of action against defendants the plaintiff says: that on the 25th day of April, A. D. 1886, the defendants made and delivered to Alden and Harris, a firm composed of George C. Alden and Jesse Harris, a promissory note of which the following is a copy.

"$1700.00 Fort Collins, April 25th, 1886."

"On or before ninety days after date we promise to pay to" "the order of Alden & Harris, Seventeen hundred dollars," "at Fort Collins, Colorado. Value received with interest at" "the rate of ten per cent. per annum from date."

"(Signed) JOHN A. WISHERD,"
"S. O. WISHERD."

That on or about the 9th day of August, A. D., 1886, the said Alden & Harris, for a valuable consideration, sold, transferred and delivered said note to said George C. Alden, who, at the time of his death as aforesaid, was the holder and owner of said note.

No part of said note has been paid and there is due thereon from the defendants to the plaintiff the sum of Seventeen hundred ($1700.) dollars, with interest thereon at the rate of ten per cent. per annum from April 25th, 1886.

II. For a second cause of action against defendants plaintiff says, that on the 25th day of April A, D. 1886, said defendants made and delivered to Alden & Harris, a firm composed of

George C. Alden and Jesse Harris, a promissory note of which the following is a copy.

"$2000.00 Fort Collins, April 25, 1886."

"July first A. D. 1887, after date we promise to pay to the" "order of Alden & Harris, Two thousand dollars, at the First" "National Bank of Fort Collins, Colorado, value received with" "interest at the rate of ten per cent. per annum, paya-"
415 "ble annually."

"(Signed.) JOHN A. WISHERD."
" "S. O. WISHERD."

That on or about the 9th day of August, A. D. 1886, the said Alden & Harris, for a valuable consideration sold, transferred and delivered said note to said George C. Alden, who, at the time of his death was the owner and holder thereof. No part of said note has been paid, and there is due thereon from the defendants to this plaintiff the sum of Two thousand dollars, with ten per cent. interest from April 25, 1886.

III. For a third cause of action against said defendants plaintiff says: that on the 25th day of April, A. D. 1886, said defendants made and delivered to Alden & Harris, a firm composed of George C. Alden and Jesse Harris, a promissory note, of which the following is a copy:

"$2000.00 Fort Collins, Colo, April 25, 1886."

"July 1st, A. D. 1887, after date, we promise to pay to the" "order of Alden & Harris, Two thousand dollars, at the First" "National Bank of Fort Collins, value received with interest" "at the rate of ten per cent. per annum, interest payable annu-" "ally."

"(Signed.) J. A. WISHERD,"
" S. O. WISHERD."

That on or about the 9th day of August, A. D. 1886, said Alden & Harris, for a valuable consideration, sold, transferred and delivered said note to said George C. Alden, who, at the time of his death was the holder and owner thereof. No part of said note has been paid, and there is now due thereon from the said defendants to this plaintiff the sum of Two thousand dollars, with ten per cent. interest from April 25, 1886.

IV. For a fourth cause of action against said defendants plaintiff says: that on the 25th day of April, A. D. 1886, said defendants made and delivered to Alden & Harris, a firm composed of George C. Alden and Jesse Harris, a promissory note of which the following is a copy:

416 "$2000.00 Fort Collins, Col. April 25, 1886."

"July 1st A. D. 1888, after date, we promise to pay to" "the order of Alden & Harris, Two thousand dollars, at the"

"First National Bank of Fort Collins, value received, with" "interest at the rate of ten per cent. per annum. Interest" "payable annually."

"(Signed.) JOHN A. WISHERD,"
" "S. O. WISHERD."

That on or about the 9th day of August, A' D. 1886, said Alden & Harris, for a valuable consideration sold, transferred and delivered said note to said George C. Alden, who, at the time of his death, was the holder and owner thereof. No part of said note has been paid, and there is due thereon from the defendants to the plaintiff the sum of Two thousand dollars, with ten per cent. interest from April 25, A. D. 1886.

V. For a fifth cause of action against the defendants, plaintiff says: that on the 25th day of April, A. D. 1886, said defendants made and delivered to Alden & Harris, a firm composed of George C. Alden and Jesse Harris, a promissory note, of which the following is a copy:

"$2000.00 Fort Collins, Col. April 25, 1886."

"July first A. D. 1888, after date, we promise to pay to the" "order of Alden & Harris, Two thousand dollars at the First" "Nat. Bank of Fort Collins, value received, with interest at the" "rate of ten per cent. per annum. Interest payable annually."

"(Signed.) JOHN A. WISHERD,"
S. O. WISHERD."

That on or about the 9th day of August, A. D. 1886, said Alden & Harris, for a valuable consideration sold, transferred and delivered said note to said George C. Alden, who, at the time of his death, was the holder and owner thereof. No part of said note has been paid, and there is now due thereon from the defendants to plaintiff, the sum of Two thousand dollars, with ten per cent. interest from April 25, A. D. 1886.

417 VI. For a sixth cause of action against said defendants plaintiff says: that on the 25th day of April, A. D. 1886, said defendants made and delivered to Alden & Harris, a firm composed of George C. Alden and Jesse Harris, a promissory note of which the following is a copy:

"$1650.00 Fort Collins, Col, April 25, 1886."

"July 1st, A. D. 1888, after date, we promise to pay to the" "order of Alden & Harris, Sixteen hundred and Fifty dollars," "at the First Nat. Bank of Fort Collins, value received, at the" "rate of ten per cent. per annum. Interest payable annually."

"(Signed.) JOHN A. WISHERD,"
"S. O. WISHERD."

That on or about the 9th day of August A. D. 1886, said Alden & Harris for a valuable consideration, sold, endorsed,

transferred and delivered said note to George C. Alden, who, at the time of his death, was the holder and owner thereof. No part of said note has been paid and there is due thereon from defendants to plaintiff the sum of Sixteen hundred and Fifty dollars, with ten per cent. interest thereon from April 25th A. D. 1886.

Therefore plaintiff asks judgment against said defendants in the sum of Eleven thousand Three hundred and Fifty ($11, 350.) dollars, with ten per cent. interest thereon from April 25th, A. D. 1886, and cost of suit.

HAZLETT & BATES,
Attorneys for Plaintiff.

State of Massachusetts,
Franklin County.—ss.

Susan B. Alden, being first duly sworn, deposes and says under oath, that she is the executrix of the estate of George C. Alden, deceased, and the plaintiff in this action; that she believes the facts set forth in the foregoing petition are true.

(Signed.) SUSAN B. ALDEN.

418 Subscribed and sworn to before me this 13th day of May, A. D. 1889.

[Seal] HENRY M. PUFFER,
Notary Public.

Indorsed. In the District Court, Gage County, Nebraska. Susan B. Alden, executrix, plaintiff, vs. John A. Wisherd and S. O. Wisherd, defendants. Filed May 18, 1889. Title of action on Promissory notes. Attorneys, Hazlett & Bates, for Plff.

In the District Court, Gage County, Nebraska.

SUPPLEMENTAL PETITION.

Susan B. Alden, Executrix of the Estate of George Alden, Deceased, Plaintiff,

vs.

John A. Wisherd and S. O. Wisherd, Defendants.

The plaintiff alleges that since the filing of her former petition in this action, to which this is supplemental, there has accrued to her upon two notes which were executed by defendants to Alden & Harris, as described in the causes of action hereinafter mentioned as follows:

Seventh cause of action:

For a seventh cause of action against defendants plaintiff says: that on the 25th day of April, A. D. 1886, the defendants

executed and delivered to Alden & Harris their promissory notes in words and figures following:

"$1450.00. Fort Collins, April 25, 1886."

"July 1st, A. D. 1889, after date, we promise to pay to the" "order of Alden & Harris, Fourteen hundred and Fifty dol-" "lars, at First Nat. Bank of Fort Collins. Value received" "with interest at the rate of ten per cent per annum, interest" "payable annually."

"JOHN A. WISHERD."
"S. O. WISHERD."

419 That thereafter said note was sold, assigned and transferred to George C. Alden, and thereby this plaintiff became and is the holder and owner thereof. No part of said note has been paid, and there is now due thereon from the defendants to the plaintiff the sum of $1450.00, with ten per cent. interest thereon from April 25, 1886.

Eighth cause of action:

For an eighth cause of action against defendants, plaintiff says: that on the 25th day of April, A. D. 1886, the defendants executed and delivered to Alden & Harris, their promissory note, in the words and figures following:

"$2000.00. Fort Collins, Co. April 25, 1886."

"July 1st, A. D. 1889, after date, we promise to pay to the" "order of Alden & Harris, Two thousand dollars, at First Na-" "tional Bank of Fort Collins, value received, with interest at" "the rate of ten per cent. per annum, interest payable an-" "nuallly."

"JOHN A. WISHERD."
"S. O. WISHERD."

That thereafter said note was for a valuable consideration sold and assigned to George C. Alden, and upon the death of said George C. Alden, this plaintiff became and still is the owner and holder of said note. No part of said note has been paid and there is now due thereon from the defendants to plaintiff the sum of Two thousand dollars, with ten per cent. interest thereon from April 25, A. D. 1886.

Wherefore plaintiff prays judgment against the defendants in the sum of Fourteen thousand Seven hundred dollars, with ten per cent. interest thereon from April 25th, 1886, and costs of suit.

HAZLETT & BATES,
Attys. for Plaintiff.

State of Nebraska,
Gage County—ss.

Charles O. Bates, being first duly sworn deposes and
420 says under oath, that he is one of the attorneys for plaintiff, who is a non-resident of and now absent from said County; that he believes the facts set forth in the foregoing supplemental petition are true.

CHARLES O. BATES.

Subscribed and sworn to before me, this 30th day of August, A. D. 1889.

[Seal] W. C. LeHANE,
Notary Public.

We hereby consent to the filing of the above supplemental petition.

R. W. SABIN,
Atty. for Defendants.

Indorsed: In the District Court, Gage County, Nebraska. Susan B. Alden, Executrix, vs. John A. Wisherd, et al. Supplemental Petition. Filed September 21, 1889. F. H. Holt, Clerk D. C. By E. E. Worran, Deputy. Hazlett & Bates, Attys. for Plaintiff.

In the District Court, Gage County, Nebraska.

ANSWER.

Susan B. Alden, Executrix of the Estate of George C. Alden, Deceased, Plaintiff,
vs.
John A. Wisherd and S. O. Wisherd, Defendants.

And now comes the said John A. Wisherd and S. O. Wisherd, defendants, and make answer to plaintiff's petition, supplemental petition, filed herein, and alleges:

1st. That they admit the making and signing of said notes, as alleged in plaintiff's petition.

2nd. Said defendants allege that the said defendant S. O. Wisherd is merely surety on said notes, and received no part of the consideration for which said notes were given.

3rd. These defendants allege for a defense to said notes; that on, to-wit: April 25th, 1886, said defendant John A. Wisherd purchased a large herd of brood mares of Alden &
421 Harris, and that is the only consideration for which notes were given; that the said notes were given as a part of the purchase price of between four and five hundred head of brood mares, horses, bought of the said Alden & Har-

ris; and that the said George C. Alden, deceased, was the same Alden mentioned in the said notes and was a partner of the said Harris, composing the firm of Alden & Harris; that said brood mares, horses, were purchased of the said Alden & Harris in the vicinity of Fort Collins, Colorado. That at the time of the purchase of said mares, said John A. Wisherd being ignorant and not advised as to the health and soundness of said brood mares from any infections or contagious disease demanded as a part of the consideration of the purchase price of the same; that said Alden & Harris should give him a written warranty that said horses were free and clean of all contagious diseases, and the said Alden & Harris made, executed and delivered their certain obligation in writing warranting said brood mares for which said notes were given in these words:

"Fort Collins, Col., April 25, 1886.

We hereby guarantee all the horses sold to John A. Wisherd, consisting of the box (A) and box forty-one (41) brands, to be free from any and all contagious diseases and agree to make good all losses sustained (if any) through any such disease existing among said horses.

(Signed) ALDEN & HARRIS."

Defendant John A. Wisherd, relying upon said warranty, purchased said property and gave said notes. Defendants allege further that said horses were affected at the time said warranty was made, with contagious disease; tht said defendant John A. Wisherd immediately upon the purchase of said horses, he shipped them to Nebraska, and that upon their arrival in the State of Nebraska, they immediately commenced to die with contagious disease and those that were afflicted communicated the disease to the rest of said herd; some two hundred of the said horses dying from said disease of
422 the value of the purchase price of Twelve thousand dollars; that many that did not die were sorely afflicted and became almost worthless and it rendered the whole herd almost useless and worthless as brood mares; that said disease was communicated to the colts and offspring of said mares, so that the most of them died, and that said disease was communicated to the other horses of said defendant, John A. Wisherd, injuring them and causing them to die; in all causing a loss to said John A. Wisherd, by reason of said contagious disease of the sum of Fifteen thousand ($15000.00) dollars.

4th. Defendants further allege, that said George C. Alden, during his life time as special inducement and offer to get the said John A. Wisherd, to buy all the horses of said Alden & Harris, of certain brands for which said notes were given, entered into a written obligation on his part to have indorsed

on said notes the sum of Five thousand ($5000.00) dollars, in words as follows:

"Fort Collins, Col., April 22nd, 1886."

For value received and in consideration of the purchase of all the box (A) and box forty-one (41), horses of John A. Wisherd. I hereby agree that said Wisherd shall have credit for Five thousand ($5000.00) dollars, and his notes to be taken in payment for said horses.

(Signed) GEO. C. ALDEN."

That by reason of said last above obligation in writing, the said John A. Wisherd was induced to buy all of said brands horses, from time to time and did so thereby became entitled to have credit by the said George C. Alden, on his part of said notes the sum of Five thousand dollars, which the said George C. Alden failed to do during his life time, and said executrix has failed and refused to do so since his death. Defendants allege that said horses were bought at a consideration of between $30,000.00 and $40,000.00, and this agreement by the said George C. Alden, deceased, was given as a- inducement for the said Wisherd to buy all of said brand of horses.

423 Wherefore said defendants ask that an account be taken on the loss and damage sustained by reason of the contagious disease of said horses, and that the said $5000.00 be taken and applied on said notes, and that plaintiff's action be dismissed at her costs.

R. W. SABIN,
Atty. for Defendants.

State of Nebraska,
Gage County—ss.

R. W. Sabin, attorney for defendants, being duly sworn says, that the facts and averments set forth in foregoing answer, are true as he verily believes.

R. W. SABIN.

Subscribed and sworn to before me, this 4th day of October, 1889.

[Seal] .....
Clerk of District Court.

Indorsed: In the District Court, Gage County, Nebraska. Susan B. Alden, Administratrix, vs. John A. Wisherd, et al. Answer. Filed October 4, 1889. H. H. Holt, Clerk. R. W. Sabin, Atty. for De'fts.

In the District Court, Gage County, Nebraska.

REPLY.

Susan B. Alden, Executrix, Plaintiff,
vs.
John A. Wisherd and S. O. Wisherd, Defendants.

Comes now the above named plaintiff and for reply to defendant's answer filed herein says, she denies that Alden & Harris, or any [—] for them, ever signed, executed and delivered the written warranty set up in said answer; she denies that George C. Alden in his life time, as a special inducement and offer to get the said John A. Wisherd to buy all the horses of said Alden & Harris, of certain brands for which said notes were given, ever signed, executed or delivered a written obligation on his part, to have indorsed on said notes the sum
424 of $5000.00 as set forth and copied in defendant's answer; and denies that either the said George C. Alden, or any one for him, ever signed, executed or delivered any such obligation; and she denies each and every allegation of new matter in said answer contained.

HAZLETT & BATES,
Plaintiff's Attorneys.

State of Nebraska,
Gage County—ss.

Charles O. Bates, being first duly sworn, deposes and says under oath, that he is one of the attorneys for the plaintiff in this action; that he believes the facts set forth in the foregoing reply are true; that plaintiff is a non-resident of and now absent from said County and State.

CHARLES O. BATES.

Subscribed and sworn to before me, this 31st day of October, A. D. 1889.

[Seal] W. C. LeHANE,
Notary Public.

Indorsed: In the District Court, Gage County, Nebraska. Susan B. Alden, Executrix, vs. John A. Wisherd and S. O. Wisherd. Reply. Filed Nov. 1, 1889. F. H. Holt, Clerk District Court. By E. E. Morran, Deputy. Hazlett & Bates, Attys. for plaintiff.

Upon the back of said Stipulation appear indorsements in the words and figures following, to-wit: No. 270 P. In the District Court, Gage County, Nebraska. Susan B. Alden, Executrix, plaintiff, vs. John A. Wisherd and S. O. Wisherd, defendants. Stipulation. Filed Mar. 20, 1895. Elmer D. Frank, Clerk. Attorneys: Hazlett & Bates, for Pl'ff.

425 Thereupon afterwards, to-wit: on the 29th day of March, 1889, a Stipulation was filed in said case, which said Stipulation is in the words and figures following, to-wit:

In the Circuit Court of the United States, in and for the District of Nebraska.

STIPULATION.

Jojn S. Bilby, Complainant,
vs.
Prentiss D. Cheney and Susan B. Alden, Executrix, etc., Interpleader, [Respondants].

It is hereby stipulated by and between the complainant by his solicitor, R. W. Sabin, and the respondent Prentiss D. Cheney by his solicitor, Charles E. Magoon, that the evidence taken in the case of Prentiss D. Cheney, plaintiff, vs. Moses Hughes, et al, defendants, in the Circuit Court of the United States of the District of Nebraska, (being an action at law, judgment in which was rendered in the said cause and Court as shown by the record) reduced to Bill of Exceptions, and now in the Supreme Court of the United States, or such part of said record or evidence, as shown by said Bill of Exceptions, as either of the parties hereto may want to use in their behalf in this case may be so used.

This stipulation to include the depositions taken in said cause; and it is further agreed that such other parts of the record, in the case of Prentiss D. Cheney vs. Moses Hughes et al, that it is desirable for either party to use in the hearing of said case may be used by either party as they may see proper subject to the objections of materiality, relevancy and competency, waiving the objections that said testimony was not taken, or said record made in this action.

And it is further stipulated by the parties hereto, that each one will stipulate to the Supreme Court of the United States, and use their best endeavors to have the Bill of Exceptions in said Court in the case of Cheney vs. Hughes, et al returned to the custody of the Clerk of the Circuit Court of the United States for Nebraska, there to be subjected to the use and inspection of the parties hereto.

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Dated this 8th day of February, 1895.

JOHN S. BILBY.
By R. W. SABIN,
Complainant's Solicitor.
PRENTISS D. CHENEY,
By CHAS. E. MAGOON,
Respondent's Solicitor.

Upon the back of said Stipulation appear indorsements in the words and figures following, to-wit: No. 270 P. In the Circuit Court of the United States, in and for the District of Nebraska. John S. Bilby, complainant, vs. Prentiss D. Cheney and Susan B. Alden, Executrix, etc., Interpleader, Respondents. Stipulation. Filed Mar. 29, 1895. Elmer D. Frank, Clerk. R. W. Sabin, Solicitor for Complainant. Charles E. Magoon, Solicitor for Respondents.

Said depositions referred to in the foregoing Stipulation and used in the trial of said cause, are in the words and figures following, to-wit:

United States of America,
District of State of Colorado,
County of Arapahoe—ss.

Be it remembered that on this 6th day of November, A. D. 1885, I, W. W. Cover a notary public, appointed, duly commissioned and qualified, and by the laws of the United States authorized and empowered to take depositions in cases pending in the Circuit Court of the United States did call, and cause to be, and personally appear before me at the office of W. W. Cover, in Cass and Graham Block, Corner of 16th & Curtis Street in the City of Denver, in the County of Arapahoe and State of Colorado, and in the said District, Gilead P. Cheney to testify, and the truth to say on the part and behalf of the
427 plaintiff in a certain suit and matter of controversy now depending and undetermined in the Circuit Court of the United States, for the District of Nebraska, at Omaha, in the District aforesaid, wherein Prentiss D. Cheney is plaintiff and Thomas Hughes, Moses Hughes, John A. Wisherd, defendants, consolidated with other suits are defendants.

And the said Gilead P. Cheney, being about the age of forty-seven years and having been by me first cautioned and sworn to testify to the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Gilead P. Cheney, and he did thereupon depose and testify and say as follows, to-wit:

Int. 1. What is your name, age and residence?

Ans. My name is Gilead P. Cheney, age about forty-seven years and my residence is the City of Denver, and State of Colorado.

Int. 2nd. Do you know the parties to this suit, or either of them, and, if so, which of them?

Ans. I know the plaintiff P. D. Cheney, he is my brother. I do not know the defendants, or any of them.

Int. 3rd. Where were you on Monday May 5th, A. D. 1884?

Ans. I was in Tecumseh, State of Nebraska.

Int. 4th. Please state in a narrative form the business that took you to Tecumseh. State fully.

Ans. I had in my possession on May 5th, A. D. 1884, two notes signed by John A. Wisherd payable to the order of my bro. P. D. Cheney. One note for $1886.73, the other note of $905.63, they were both due on May 5th, 1884, it being the third or last day of grace. On that day I applied at the bank of Russell & Holmes, in Tecumseh, where the notes were payable, for the money and they informed me that they had no money with which to pay the notes. I inquired for John A. Wisherd and Russell & Holmes informed me that he had not
428 been there on that day, or for some time previously. That he did not reside in Tecumseh, I was unable to get the money [—] the notes. I was in the bank several times, until it closed, Wisherd was not there, nor was any person there to pay the notes. My only object in going to Tecumseh was to collect these two notes.

GILEAD P. CHENEY.

Subscribed in my presence and sworn to before me by said Gilead P. Cheney, this 6th day of November, A. D. 1885.

[Seal] W. W. COVER,
Notary Public.

United States of America,
District of the State of Colorado,
County of Arapahoe—ss.

I, W. W. Cover, a notary public duly appointed, commissioned and qualified and by the laws of the United States authorized, and empowered to take depositions to be used in causes pending in the Circuit Courts of the United States, do hereby certify, that the reasons for taking the foregoing deposition is, and the fact is, that the testimony of said witness is material and necessary for the plaintiff in the cause in the caption of the said deposition named, and that the said witness lives and did live at the time of taking said deposition in the City of Denver, State of Colorado, the same being at a greater distance than one hundred miles from Omaha, in the State of Nebraska, the place of trial of the said cause, to-wit: more than one hundred miles therefrom.

I further certify that as appears by the notice hereto attached, due notice of the time and place of taking the said deposition, and the names of the witnesses to be examined, were given.

I further certify that on the 6th day of November, A. D. 1885, at the hour of nine o'clock in the forenoon, I was attended at the office of W. W. Cover, in the City of Denver, in the County

of Arapahoe and State of Colorado aforesaid, by the plaintiff Prentiss D. Cheney and the witness Gilead P. Cheney, who was
429 of sound mind and lawful age and the said witness was by me carefully examined and cautioned and sworn to testify the truth, the whole truth and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness, and from his statements, and after carefully reading the same to the witness, he subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up, and directing the same with this certificate of the reasons aforesaid for taking said deposition with my own hand to the Court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named, or in any way interested in the event of the said cause named in said caption.

In testimony whereof, I have hereunto set my hand and seal this the 6th day of November, A. D. 1885.

[Seal] W. W. COVER,
Notary Public.

Fees.

Notary, W. W. Cover,	$5.00
Witness, G. P. Cheney,	1.50
Total,	$6.50

Paid by Plaintiff.

Also L. C. Chapman, who being by me first duly sworn, testified as follows:

My name is L. C. Chapman. My age is 26 years. My residence is Tecumseh, Nebr. My occupation is that of a lawyer. I am acquainted with the plaintiff P. D. Cheney and J. A. Wisherd, one of the defendants. On the 6th day of May, 1884, S. O. Wisherd, a brother of J. A. Wisherd came into my office, at Tecumseh, Neb. on the morning of that day before banking hours, at which time, while in my office, he told me that he had come to pay the J. A. Wisherd notes, made to P. D. Cheney for certain lands in Gage County. He and I went to breakfast together on that day at the Centennial Hotel, and
430 while there, he and I had a conversation in regard to this land and the business in reference to a section of land that he wished a separate contract for.

Q. Was there anything said in that conversation in regard to P. D. Cheney executing to S. O. Wisherd a separate contract from that given by Cheney to J. A. Wisherd, for a section of

land mentioned in the original contract, between J. A. Wisherd and P. D. Cheney?

Objected to as immaterial and irrelevant and incompetent and leading.

A. Yes, there was.

Q. State what that conversation was?

Objected to as last above.

A. S. O. Wisherd wished to know if I thought P. D. Cheney would give him a separate contract, independent of a contract, which was made with J. A. Wisherd. After this conversation I did not see S. O. Wisherd, until about 10½ o'clock in the forenoon of that day, and he said to me, that the notes that he had come to pay were not at the bank of Russell & Holmes, and that he had just come from there, and wanted to know of me, what he had better do. I told him that he had better leave his money, which he had to pay the notes, with Russell & Holmes for P. D. Cheney, and have them write to Cheney that the money was there. He then said that (as near as I can remember), he had drafts either payable at Bilby's bank or in some way connected with Bilby. He asked me at the same time if I thought a day or so delay in payment would make any difference with Cheney. I told him I thought not, but did not know.

Sometime after this I had a talk with J. A. Wisherd, in Tecumseh, and he then told me that he had instructed his brother not to pay the money into the bank of Russell & Holmes for Cheney, unless the notes were there, and if they were not there to take the money away with him as he was afraid of the bank of Russell & Holmes, as he did not know their financial
431 condition and was not acquainted with them in a financial way.

Cross-Examination.

Q. State what relationship you occupied to P. D. Cheney, May 6th, 1884?

A. I did some business for Cheney at that time, was not employed generally.

Q. Were you employed by Cheney at that time to look after this Wisherd matter?

A. No, I can't say I was employed to look after it. I was not.

Q. What time did S. O. Wisherd first come to your office on May 6th, 1884, and why did he come to see you?

A. He came to my office before banking hours: I think about 7½ o'clock in the morning. I do not know why he came.

Q. Did he tell you he had the money to pay the Cheney notes on the J. A. Wisherd contract, for land in Gage County, that were then due?

A. He said he had come to pay the notes that were then due on that contract.

Q. Did he show you the drafts or money?

A. He had (if I remember correctly) some papers in his hand that he called or said were drafts with which he said he was going to pay the notes off.

Q. Did he offer to let you examine them; if so, what did you do?

A. When he and I were talking, I told him that I had no business with any money due on those contracts with Cheney, but he must go to Russell & Holmes.

Q. What did he say to you about going to the bank of Russell & Holmes on May 6th, 1884, as soon as it was open?

A. On the morning on which he was here he came into my office the second time, and said the notes were not at the bank; this was shortly after the bank opened in the morning.

432 Q. You do not know of your own knowledge whether he was here on the 5th day of May, 1884, or not, do you?

A. I do not know.

Q. What makes you so positive he was here on the 6th day of May, 1884?

A. From my own memory and from referring to the hotel register at the same place above spoken of; the Centennial Hotel, which shows he registered on May 6th, 1884, and took breakfast there and I am positive he was there on that day.

Q. In whose office was the original contract drawn between Cheney and Wisherd regarding the land in controversy?

A. I do not know of my own knowledge.

Defendants rest, it now being 11:20 o'clock, A. M.

D. April 27th, 1884.

L. C. CHAPMAN.

CERTIFICATE.

State of Nebraska,
County of Johnson—ss.

I, Clarence K. Chamberlain, a notary public within and for the County of Johnson and State of Nebraska, do hereby certify that the above named Charles A. Holmes and L. C. Chapman, witnesses, whose names are subscribed to the foregoing deposition were by me first duly sworn to tell the truth, the whole truth and nothing but the truth; that the foregoing depositions by them respectively subscribed, were reduced to writing by me and were by said witnesses respectively subscribed

in my presence and were taken at the time and place specified in the notice hereto attached, there having been one adjournment as noted above. And the taking of said deposition was commenced on the 26th day of April, 1886, and was continued from day to day as provided in the notice hereto attached, until the 27th day of April, 1886, at 11:30 o'clock, when the taking of said depositions was closed. And I further certify that I am not attorney for or of counsel to any of the parties in the above entitled action or in any way interested in the event of the said action.

433 Witness My hand and notarial seal this 27th day of April, 1886.

[Seal] CLARENCE K. CHAMBERLAIN,
Notary Public in and for Johnson Co., Neb.

Thereupon afterwards, towit: on the 1st day of April, 1895, Evidence for Respondent P. D. Cheney was filed in said case, which said Evidence is in the words and figures following, towit:

Supreme Court of the United States.
No. 471. October Term, 1890.

Prentiss D. Cheney, Plaintiff in Error,
vs.
Thomas Hughes, et al.

In error to the Circuit Court of the United States for the District of Nebraska.

This cause having been called to the attention of the Court by Mr. William A. McKenney, of counsel for the plaintiff in error, and he having moved the Court to dismiss this cause.

Therefore in pursuance of said motion, it is now here ordered and adjudged by this court, that the writ of error in this cause be, and the same is hereby, dismissed with costs.

January 5th, 1891.

Indorsed: Supreme Court U. S. No. 741. October Term, 1890. Filed January 5th, 1891.

Supreme Court of the United States.

I, James H. McKenney, Clerk of the Supreme Court of the United States do hereby certify that the foregoing is a true copy of the judgment entered by said Supreme Court on the 5th day of January, 1891, in the case of Prentiss D. Cheney, plaintiff in error, vs. Thomas Hughes, et al.

No. 741. October Term, 1890, as the same remains upon the files and records of said Supreme Court.

434 In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this 29th day of March, A. D. 1895.

[Seal.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Upon the back of said Evidence appear indorsements in the words and figures following, to-wit: No. 270 P. John S. Bilby, vs. Prentiss D. Cheney. Evidence for Respondent Cheney. Filed Apr. 1, 1895. Elmer D. Frank, Clerk.

Thereupon afterwards, to-wit: at the January 1895 term of said Court and on the 17th day of April, 1895, the following, proceedings were had and done in said case, as appears of record on folio 587 of Journal T. of said Court, to-wit:

John S. Bilby,
No. 270 P. vs.
Prentiss D. Cheney.

On motion of the complainant by R. W. Sabin, solicitor, leave is hereby granted by the Court to file Replication to Amended Answer herein today.

And on like motion, it is further ordered that the time to take proofs herein be, and the same is hereby extended, to half past two o'clock, next Monday, the 22nd inst.

435 Thereupon afterwards, to-wit: on said 17th day of April, 1895, a Replication was filed in said case, which said Replication is in the words and figures following, to-wit:

In the Circuit Court of the United States, in and for the District of Nebraska.

IN EQUITY.

John S. Bilby, Complainant,
No. 270 P. vs.
Prentiss D. Cheney, Respondent.

The replication of John S. Bilby, complainant, to the amended answer of Prentiss D. Cheney, defendant.

The repliant saving and reserving unto himself now and at all times hereafter, all, and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer for replication thereunto, say that they will aver, maintain and prove his said Bill of Complaint to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant —uncertain, untrue and insufficient to be replied unto by this

repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things the repliant is, and will be ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays as in and by his said Bill of Complaint he has already prayed.

LAKE, HAMILTON & MAXWELL and R. W. SABIN,
Solicitors for Plaintiff.

Upon the back of said Replication appear indorsements in the words and figures following, to-wit: No. 270 Doc. P. U. S. Circuit Court, District of Nebraska. John S. Bilby, 436 Complainant, vs. Prentiss D. Cheney, et al. Replication. Filed Apr. 17, 1895. Elmer D. Frank, Clerk. Lake, Hamilton & Maxwell and R. W. Sabin, Solicitors for Plaintiff.

Thereupon afterwards, to-wit: on the 19th day of April, 1895, the Answer to the Bill of Intervention of Susan B. Alden, etc. was filed in said case, which said Answer is in the words and figures following, towit:

In the Circuit Court of the United States, for the District of Nebraska.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, Defendant.

Answer to the Bill of Interpleader filed by Susan B. Alden, Executrix, etc.

To the Honorable Judges of the Circuit Court of the United States within and for the District of Nebraska.

This complainant now, and at all times thereafter saving and reserving unto himself all benefit and advantage of exception, which can or may be had, or taken to the many errors and uncertainties and other imperfections in the said Interpleader's cross complaint for answer thereunto, or into such parts thereof, as this complainant is advised is or are material or necessary for him to make answer unto, this complainant answering thereto sayeth, that he denies each and every allegation in said Interpleader's cross bill set forth, excepting such as are hereinafter expressed and admitted to be true. Said complainant not being advised as to the residence of the said Susan B. Alden, as alleged in her cross bill, but admits the same.

2nd. Said complainant not being advised as to the judgment set forth in her cross bill against John A. Wisherd, and

having no knowledge of the same, calls for strict proof of the same.

437 3rd. Said complainant denies that on the 24th day of March, 1890, the said John A. Wisherd was the owner and had the title to the real estate described in said cross bill, and in complainant's bill, or that he said John A. Wisherd had any interest whatever in said property at said time.

4th. Said complainant further denies any conspiracy between himself and John A. Wisherd, for the express purpose of cheating and defrauding the said defendant out of any money that might be due her from said John A. Wisherd or for any other purpose whatever.

Said complainant further denies that he had any knowledge of any judgment existing against John A. Wisherd on behalf of said cross complainant or that there was any indebtedness due said cross complainant from said John A. Wisherd.

5th. The said complainant further denies that said deed from John A. Wisherd to complainant was dated back, but avers that said deed was made at the time and in the manner as set forth in his bill of complaint, and this complainant denies all manner of unlawful combination and confederacy wherewith he is by the said cross bill charged, without this, that there is any other matter, cause or thing in said Interpleader's cross bill of complaint contained, material or necessary for this defendant to make answer to, not herein or hereby sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant, all of which matters and things this complainant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays that the said cross bill shall be dismissed, and in so far as said cross bill is concerned, filed by the interpleaders, and that said complainant may go hence with his reasonable costs and charges in this behalf most wrongfully sustained.

LAKE, HAMILTON & MAXWELL and R. W. SABIN,
Solicitors for Complainant.

438 State of Nebraska,
County of Gage—ss.

R. W. Sabin, solicitor for complainant, being first duly sworn upon oath says, that he knows the contents of the foregoing pleading, and that the facts and averments therein stated are true as he verily believes. That the complainant is

now absent from said State is the reason that affiant verifies this answer.

R. W. SABIN.

Subscribed in my presence and sworn to before me this 18th day of April, 1895

[Seal.] F. O. McGIRR,
Notary Public.

Now comes the said Susan B. Alden, Executrix, etc. by her solicitor Alfred Hazlett and consents to the filing of this answer at this time, and that it shall not work any continuance for plaintiff Bilby in the trial of this cross bill at present time or term.

April 18, 1895.

ALFRED HAZLETT,
Solicitor for the Interpleader.

Upon the back of said Answer to the Bill of Intervention of Susan B. Alden, etc., appear indorsements in the words and figures following, to-wit: No. 270 P. In the Circuit Court of the United States, District of Nebraska. John S. Bilby, complainant, vs. Prentiss D. Cheney, Respondent. Answer to the Bill of Intervention of Susan B. Alden, etc. Filed Apr. 19, 1895. Elmer D. Frank, Clerk. Lake, Hamilton & Maxwell and R. W. Sabin, Solicitors for complainant.

Thereupon afterwards, to-wit: on said 19th day of April, 1895, a Deposition on behalf of Complainant was filed in said case, which said Deposition is in the words and figures following, to-wit:

439 In the Circuit Court of the United States, District of Nebraska.

John S. Bilby, Plaintiff,
vs.
Prentiss D. Cheney, et al., Respondents.

Deposition of J. D. McFarland, it is hereby stipulated by and between the plaintiff L. S. Bilby and respondent Prentiss D. Cheney, that the deposition of J. D. McFarland may be taken at this time and place, without the formality of a notice, complainant being represented by R. W. Sabin and the respondent by C. E. Magoon.

R. W. SABIN,
Solicitor for Plaintiff.
CHAS. E. MAGOON,
Solicitor for Respondent Cheney.

J. D. McFarland of lawful age, being first duly examined, cautioned and solemnly sworn as hereinafter certified, deposeth and sayeth as follows:

Q. State your name?
A. J. D. McFarland.
Q. You are the same J. D. McFarland who has heretofore testified in this case?
A. I am.
Q. Calling your attention to the conversation between you and respondent Prentiss D. Cheney on the 6th day of May, 1891, I will ask you what Cheney said to you on that day in any conversation that you had with him in the First National Bank of Lincoln, or at any other place about his having a deed with him and in his possession ready to deliver upon the payment of the money due him, if any thing.

The respondent Cheney objects as incompetent, immaterial and irrelevant, no foundation laid for the introduction of such evidence as having already been answered and leading.

440 A. I have no recollection of Mr. Cheney saying anything to me about having a deed in his possession.
Q. The former question has reference to a deed in Cheney's possession to the land in controversy in this case, do you so understand it?
A. That is what I understand.
Q. State whether he showed any deed to you, or to any one else in your presence, to the land in controversy, on that day?

Respondent Cheney objects as incompetent, immaterial and irrelevant.

A. He did not show me a deed on that occasion.
Q. Please state whether you remember of his saying anything about a deed of the character above described, on that day in your presence?
A. To the best of my recollection, he said nothing about a deed.

Complainant rests.

J. D. MACFARLAND.

I, W. L. Murphy, a notary public, do hereby certify, that J. D. Macfarland was by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and that the deposition by him respectively subscribed, as above set forth, was written by Chas M. Woodward, who is not interested in the suit, and this was done in my presence and in the presence of the witness, respectively, and was subscribed by the witness in

my presence, and was taken at the time and place in the above specified stipulation, that I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit, and said deposition was commenced at the time in said stipulation mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my notarial seal, this 19th day of April, 1895.

[Seal] W. L. MURPHY,
Notary Public.

My commission expires February the 24th, 1898.

Fees.

400 words, ... .80
2 certificates, 25c ea. ..... .50

$1.30

Paid by Plaintiff.

441 Witness Fee,
J. D. Macfarland. 1.60.

Upon the back of said Deposition appear indorsements in the words and figures following, to-wit: No. 270 P. Rec'd and filed Apr. 19, '95. And opened by order of Court, Apr. 22/95. E. D. Frank, Clerk.

Thereupon afterwards, to-wit: at the May 1895 term of said Court and on the 6th day of May, 1895, the following proceedings were had and done in said case as appears of record on folio 676 of Journal T. of said Court, to-wit:

In the Circuit Court of the United States, District of Nebraska.

DECREE.

John S. Bilby, Complainant,
No. 270 P. vs.
Prentiss D. Cheney, Respondent, and Susan B. Alden, Executrix of the Estate of George C. Alden, deceased, Intervenor.

Now on this sixth day of May, in the year of our Lord one thousand eight hundred and ninety-five, this cause coming on further to be heard, upon the bill of complainant, the answer of respondent Prentiss D. Cheney and complainant's reply thereto, the bill of intervention of Susan B. Alden, Executrix of the estate of George C. Alden, deceased, and complainant's answer thereto, the evidence of complainant and respondent and of the said intervenor, and the argument of counsel of the several parties hereto, and the court after fully considering the same and being fully advised in the premises, finds the equities upon the issues joined generally in favor of the complainant, and that said complainant is in all respects entitled to the relief as prayed for in his said bill of complaint, and

therefore on consideration thereof it is ordered, adjudged and decreed as follow-, viz:

That the said complainant and his grantor have complied with and carried out the agreements, stipulations and requirements on their part to be performed by virtue of the
442 land contract entered into on May, 2, 1881, between the respondent Prentiss D. Cheney and plaintiff's grantor John A. Wisherd, and that said complainant is entitled to a deed with the ordinary covenants of warranty reserving and excepting the right of way that may be demanded for public use for railways or common roads, from the said respondent Prentiss D. Cheney, upon the payment by the said complainant to said respondent of the sum of Nineteen thousand Five hundred and Twelve dollars ($19,512.00) the amount due on the notes given by the said Wisherd to said Respondent Cheney as set forth in said contract, and the further sum of Five hundred Sixty-one and 70/100 dollars ($561.70) the amount of taxes paid by the said respondent Cheney on said land on April 5th, 1894, including interest thereon, making in all the sum of Twenty thousand Seventy-three and 70/100 dollars ($20,073.70).

It is further adjudged and decreed that the said complainant John S. Bilby pay to the said respondent Prentiss D. Cheney or into this Court for his use and benefit within thirty (30) days from this date, the said sum of Twenty thousand Seventy-three and 70/100 dollars, ($20,073.70), and within thirty (30) days thereafter the said respondent Prentiss D. Cheney is ordered to convey to the said complainant John S. Bilby by deed with the ordinary covenants of warranty (excepting the right of way that may be demanded for public use for railways or common roads and any taxes that may be due thereon), the land described in complainant's bill and in said land contract as follows: All of section one (1), in township five (5), range seven (7) east; all of section twenty-four (24), in township six (6), range seven (7) east; all of section nine (9), in township six (6), range eight (8) east, the north east quarter (N. E. $\frac{1}{4}$) of section five (5), in township five (5), range seven (7) east, the fractional west half (W.$\frac{1}{2}$) of section six (6), in township five (5) range eight (8) east, said premises situate and being in the County of Gage and State of Nebraska.

443 It is further ordered, adjudged and decreed that upon the failure of the said respondent Prentiss D. Cheney for the space of sixty (60) days from this date to execute and deliver the aforesaid deed to the complainant John S. Bilby or to the Clerk of this Court for him and his use and benefit, that this decree and judgment shall stand and operate as a deed and conveyance of all of said above described land from the said Prentiss D. Cheney to the said John S. Bilby.

It is further ordered, adjudged and decreed that the respondent Prentiss D. Cheney be restrained from proceeding with the actions at law now pending in the Circuit Court of the United States for the District of Nebraska, and filed therein on the 29th day of May, 1891, and described in complainant's bill as follows: One of Prentiss D. Cheney versus John A. Wisherd and Samuel O. Wisherd to recover section twenty-four (24), town six (6), range seven (7); one of Prentiss D. Cheney versus John A. Wisherd and William Long to recover possession of section nine (9), town six (6) range eight (8) east; one of Prentiss D. Cheney versus John A. Wisherd to recover possession of section one (1), in township five (5) range seven (7) east and the fractional west half (W. ½) of section six (6), town five (5), range eight (8) east; one of Prentiss D. Cheney versus John A. Wisherd and Richard Bowman to recover possession of the north east quarter (N. E. ¼) of section five (5) in township five (5) range seven (7) east; and that the temporary order of injunction heretofore granted in this Court shall be and the same is hereby made perpetual.

It is further ordered, adjudged and decreed that the intervenor Susan B. Alden, Executrix, &c., was a mere general creditor of John A. Wisherd and had no lien upon the above described land at the time that said Wisherd conveyed said land to said complainant Bilby, and that she is not entitled to the relief prayed for her in her said bill of intervention, and that her said bill of interpleader is therefore dismissed.

It is further ordered, adjudged and decreed that the said respondent Prentiss D. Cheney shall pay the costs of this case herein taxed at the sum of $.....

JOHN A. RINER, Judge.

444 Thereupon afterwards, to-wit: on the 7th day of May, 1895, an Application for leave to file Petition for Rehearing was filed in said case, which said Application is in the words and figures following, to-wit:

In the Circuit Court of the United States for the Eighth Judicial Circuit, for the District of Nebraska.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, Respondent.

APPLICATION FOR LEAVE TO FILE PETITION FOR REHEARING.

Comes now the respondent and moves the Court for permission to file Petition for re-hearing herein for the reasons set forth in said petition, which is submitted herewith.

CHAS. E. MAGOON,
Atty. for Respondent.

Upon the back of said Application appear indorsements in the words and figures following, to-wit: No. 270 P. Circuit Court of U. S. Eighth Judicial Circuit, for Dist. of Neb. John S. Bilby vs. Prentiss D. Cheney. Application for leave to file Petition for Re-hearing. Filed May 7, 1895. Elmer D. Frank, Clerk. Chas. E. Magoon, Atty. for Respondent.

445 Thereupon afterwards, to-wit: at the May term of said Court and on the 11th day of June, 1895, the following proceedings were had and done in said case as appears of record on folio 781 of Journal T. of said Court, to-wit:

In the Circuit Court of the United States, for the District of Nebraska.

ORDER.

John S. Bilby, Complainant,
No. 270 P. vs.
Prentiss D. Cheney, Defendant.

This cause came on at this term to be heard upon the petition of the defendant for a re-hearing herein, and was argued by counsel, and thereupon, upon consideration thereof, it is now ordered, adjudged and decreed by the Court that the petition of the defendant for a re-hearing herein, be, and the same is hereby, overruled and denied.

(Signed) JOHN A. RINER, Judge.

446 Thereupon afterwards, to-wit: [om] the 9th day of July, 1895, an Assignment of Errors was filed in said case, which said Assignment of Errors is in the words and figures following, to-wit:

In the Circuit Court of the United States for the Eighth Judicial Circuit, District of Nebraska.

ASSIGNMENT OF ERRORS.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, Respondent, and Susan B. Alden, Executrix, etc., Cross-complainant.

And now on this 19th day of June, 1895, came the said defendant Prentiss D. Cheney by Charles E. Magoon, his solicitor, and says, that the decree in said cause is erroneous and against the just rights of said respondent Prentiss D. Cheney for the following reasons:

1. Because the evidence showed that the complainant John S. Bilby was without right in law or in equity to maintain said action.

2. Because the evidence showed that the contract for the purchase and sale of the property involved in said action had never been assigned to the complainant John S. Bilby, and that he was not the holder and owner thereof.

3. Because the evidence showed that the complainant John S. Bilby was without right, title, interest or estate in and to the property involved in this action.

4. Because the evidence showed that the contract for the purchase and sale of the property involved in this action had never been performed by or on behalf of the complainant or John A. Wisherd by and through whom he claimed to possess title.

5. Because the evidence showed that said contract had been forfeited and was null and void.

6. Because the evidence showed that said contract had been rescinded.

447 7. Because the evidence showed that the tenders alleged in complainant's bill to have been made, had not been kept good.

8. Because the decree does not require the complainant to pay to the defendant Cheney or to deposit in Court for his use a sum of money sufficient to execute and comply with the terms and conditions of the contract involved herein.

9. Because the evidence showed that the complainant John S. Bilby is required, and should have been by the Court required, to have paid the interest and unpaid partial payments provided for by the contract.

10. Because the finding of the Court and the decree thereof is not sustained by the evidence.

11. Because the evidence showed that the finding and decree of the Court is not sustained by the law of the case.

12. Because the evidence showed that the contract for the purchase and sale of the real estate involved herein had been abandoned by the complainant and by John A. Wisherd, by and through whom he claims the right and title to the property and contract involved.

13. Because the evidence showed that the bill of the complainant filed herein is not sufficient to maintain the action or to secure the relief for which the complainant prayed and which by the decree of said Court is granted to him.

14. Because said decree is contrary to equity.

Wherefore the said defendant Prentiss D. Cheney prays that said decree be reversed and that said Court may be directed

to enter a decree in accordance with the prayer of the answer of this respondent.

CHARLES E. MAGOON,
Solicitor for Respondent Cheney.

Upon the back of said Assignment of Errors appear indorsements in the words and figures following, to-wit: No. 270 P. John S. Bilby, vs. Prentiss D. Cheney, et al. Assignment of Errors. Filed Jul. 9, 1895. Elmer D. Frank, Clerk.

448 Thereupon afterwards, to-wit: on said 9th day of July, 1895, a Petition on Appeal was filed in said case, which said Petition on Appeal is in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

PETITION ON APPEAL.

John S. Bilby, Complainant,
In Equity. No. 270 P. vs.
Prentiss D. Cheney, Respondent, and Susan B. Alden, Executrix, etc., Cross-complainant.

The above named Prentiss D. Cheney, defendant, conceiving himself aggrieved by the decree made and entered on the 6th day of May, 1895, in the above entitled cause, does hereby appeal from said Order and decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, [amy] be sent to the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

CHAS. E. MAGOON,
Attorney for Respondent Cheney.

Dated June 19th, 1895.

The foregoing claim of appeal is allowed.

HENRY C. CALDWELL,
Circuit Judge.

Dated July 9, 1895.

Upon the back of said Petition on Appeal appear indorsements in the words and figures following, to-wit: No. 270 P. John S. Bilby, vs. Prentiss D. Cheney, et al. Petition on Appeal. Filed Jul. 9, 1895. Elmer D. Frank, Clerk.

Thereupon afterwards, to-wit: on said 9th day of July, 1895, a Citation was issued in said case, and returned and filed July 30th, 1895, the following of which is the original:

449 In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

John S. Bilby, Complainant,

vs.

Prentiss D. Cheney, Respondent, and Susan B. Alden, Executrix, etc., Cross-complainant.

To John S. Bilby, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Eighth Judicial Circuit to be holden at the City of St. Paul in said Circuit, within sixty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the District of the State of Nebraska, within said Eighth Judicial Circuit, wherein Prentiss D. Cheney is Appellant, and you are Appellee, to show cause, if any there be, why the judgment and decree rendered against said Appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in their behalf.

Witness the Honorable Henry C. Caldwell, U. S. Circuit Judge, 9th day of July, in the year of our Lord One Thousand Eight Hundred and Ninety-five, and of the Independence of the United States of America, the One Hundred and Twentieth.

Seal
United States
Circuit Court
District of Nebraska

July 9, 1895.

HENRY C. CALDWELL.

I hereby this.... day of.... accept due personal service of this citation on behalf of John S. Bilby, Appellee.

.....

District of Nebraska—ss.

I hereby certify and return that on the 16th day of July, 1895, I received this Citation and on the 17- day of July, 1895, I served the same upon the within named John S. Bilby by James W. Hamilton, of the Firm of Lake, Hamilton & Maxwell, Attys. for John S. Bilby, in Douglas County, State and

District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

FRANK E. WHITE,
United States Marshal for the District of Nebraska.
By A. E. COGGESHALL,
Deputy United States Marshal.

John S. Bilby, vs. Prentiss D. Cheney, et al. Citation. Filed July 30, 1895. E. D. Frank, Clerk.

Marshal's Costs.

Service, ...2.00
Mileage, ...

Total, ...$2.00

450 Thereupon afterwards, to-wit: on said 9th day of July, 1895, a Bond on Appeal was filed in said case, which said Bond is in the words and figures following, to-wit:

In the Circuit Court of the United States for the Eighth Judicial Circuit, District of Nebraska.

BOND ON APPEAL.

John S. Bilby, Complainant,
vs.
Prentiss D. Cheney, Respondent, and Susan B. Alden, Executrix, etc. Cross-Complainant.

Know all men by these presents, that we, Prentiss D. Cheney as principal and Chas. E. Magoon and A. H. Buckstaff, as sureties, are held and firmly bound unto John S. Bilby, complainant and appellee in the full and just sum of Five Hundred dollars, ($500.00) to be paid to the said John S. Bilby, complainant and appellee, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 18th day of June in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately at a Circuit Court of the United States for the District of the State of Nebraska in a suit depending in said Court between John S. Bilby complainant and Prentiss D. Cheney respondent, a decree was rendered against the said Prentiss D. Cheney, respondent, and the said Prentiss D. Cheney having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said John S.

Bilby citing and admonishing him to be and appear at a session of the United [—] Circuit [—] of Appeals
451 for the Eighth Circuit to be holden at the City of St. Paul in said Court on the .....day of July next.

Now the condition of the above obligation is such that if the said Prentiss D. Cheney shall prosecute said appeal to affect and answer all damages and costs if he fail to make said plea good, then the above obligation to be void, else to remain in full force and effect.

PRENTISS D. CHENEY, per
CHAS. E. MAGOON, his Solicitor.
CHAS. E. MAGOON,
A. H. BUCKSTAFF.

Sealed and delivered in presence of
WM. SCHULTZ.

Approved by HENRY C. CALDWELL,
U. S. Circuit Judge.

Upon the back of said Bond on Appeal appear endorsements in the words and figures following, to-wit: No. 270 P. John S. Bilby, vs. Prentiss D. Cheney. Bond on Appeal. Filed Jul. 9, 1895. Elmer D. Frank, Clerk.

452 United States of America,
District of Nebraska.—ss

I, Elmer D. Frank, Clerk of the Circuit Court of the United States for the District of Nebraska, do hereby certify that the foregoing folios from one to four hundred and fifty-two, contain true and faithful transcripts of all the pleadings, process and proceedings of record and on file in said Court, in the case of John S. Bilby, Complainant, vs. Prentiss D. Cheney, et al. Defendants, and that a copy of the Citation issued therein, duly certified, has been lodged and remains in my said office as said Clerk.

Seal United States Circuit Court, District of Nebraska. Witness my hand and the Seal of said Circuit Court, at Omaha, in said District, this 28th day of August, A. D. 1895.

ELMER D. FRANK,
Clerk.

Filed Sep. 2, 1895. John D. Jordan, Clerk.

334 And on the sixth day of September A. D. 1895, an appearance of counsel for Appellant was filed in the Clerk's office of said Circuit Court of Appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 708, December Term, 1895.

Prentiss D. Cheney, Appellant,
vs.
John S. Bilby, Appellee.

The Clerk will enter my appearance as Counsel for the Appellant.

CHAS. E. MAGOON.

Indorsed: U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1895. No. 708. Prentiss D. Cheney, Appellant, vs. John S. Bilby. Appearance. Filed Sep. 6, 1895. John D. Jordan, Clerk. Charles E. Magoon, Lincoln, Neb. Counsel for Appellant.

And on the fourth day of October, A. D. 1895, an appearance of Mr. James W. Hamilton, for Appellee, was filed in the Clerk's office of said Circuit Court of Appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 708, December Term, 1895.

Prentiss D. Cheney, Appellant,
vs.
John S. Bilby,

The Clerk will enter my appearance as Counsel for the Appellee.

JAMES W. HAMILTON.

335 Indorsed: U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1895. No. 708. Prentiss D. Cheney, Appellant vs. John S. Bilby. Appearance. Filed Oct. 4, 1895. John D. Jordan Clerk. James W. Hamilton, Omaha, Neb. Counsel for Appellee.

And on the sixteenth day of January, A. D. 1896, a motion to strike Assignments of Error was filed in the Clerk's office of said Circuit Court of Appeals in the words and figures following, to wit:

In the United States Circuit Court of Appeals, for the Eighth Circuit.

Prentiss D. Cheney, Appellant,

vs.

John S. Bilby, Appellee.

MOTION TO QUASH AND STRIKE FROM THE RECORD CERTAIN ASSIGNMENTS OF ERROR.

1st. Comes now the said appellee John S. Bilby by his solicitors Lake, Hamilton & Maxwell, and moves this Honorable Court to quash and strike from the record in this case each of the several assignments of error filed herein by the appellant, and numbered, respectively, 1, 2, 3, 4, 5 and 6, for the reason that each of said assignments is not made in accordance with the requirements of Rule 11 of this Court respecting assignments of error, in this, that neither of said six assignments states any particular error of the Court below in any ruling therein made.

2nd. And the appellee moves to quash and strike from the record the 7th of the assignments of error, for the reason that it does not conform to the requirements of said Rule 11, in this, that said assignment does not complain of, and set out

336 definitely and particularly, any supposed error of the Court below in any of its rulings respecting a tender—the subject-matter of said assignment.

3rd. And the appellee moves to quash and strike from the record herein the 8th and 9th assignments of error, and each one of them, for the reason that each thereof is in violation of said Rule 11, in this, that neither of them points out definitely and specifically, as said rule requires, any supposed error committed by the Court below in the trial of the case.

4th. And the appellee moves to quash and strike from the record the 10th and 11th assignments of error, and each one of them, for the reason each of them fails to conform to the requirements of said Rule 11, in this, that neither of them states "separately and particularly each error asserted and intended to be urged," as required by said rule. Each of said two assignments being especially open to the charge of duplicity.

And the appellee moves to quash and strike from the record the 12th assignment of error, which alleges abandonment of the contract by the appellee, for the reason that no question of abandonment of the contract is raised by the pleadings, nor is such question in the case, except by this assignment.

And, finally, the appellee moves the Court to quash the 13th and 14th assignments of error, and each one of them, for the reason that each of them fails to comply with said Rule 11, in this, that neither of them points to any particular supposed error of the Court below, or to any specific ruling at all prejudicial to the just rights of the appellant.

JOHN S. BILBY, Appellee,
By JAMES W. HAMILTON, &
LAKE, HAMILTON & MAXWELL,
His Solicitors.

Indorsed: No. 708. In the U. S. Circuit Court of Appeals, Eighth Circuit. Prentiss D. Cheney, Appellant vs. John S. Bilby, Appellee. Motion Appellee to Quash and Strike from the Record Certain Assignments of Error. Filed Jan. 16, 1896. John D. Jordan, Clerk. James W. Hamilton and Lake, Hamilton & Maxwell, Solicitors for Appellee.

337 And on the twenty-second day of January, A. D. 1896, an appearance of Mr. Samuel Maxwell, for Appellee, was filed in the Clerk's office of said Circuit Court of Appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 708, December Term, 1895.

Prentiss D. Cheney, Appellant,
vs.
John S. Bilby.

The Clerk will enter my appearance as Counsel for the Appellee.

SAMUEL MAXWELL.

Indorsed: U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1895. No. 708. Prentiss D. Cheney, Appellant vs. John S. Bilby. Appearance. Filed Jan. 22, 1896. John D. Jordan, Clerk. Samuel Maxwell, Fremont, Neb. Counsel for Appellee.

And on the twenty-second day of January, A. D. 1896, in the record of the proceedings of said Circuit Court of Appeals is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1895. Wednesday, January 22, 1896.

Prentiss D. Cheney, Appellant,
No. 708. vs.
John S. Bilby, Appellee.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Charles E. Magoon, in behalf of the Appellant, continued by Mr. James W.

338 Hamilton and Mr. Samuel Maxwell for the Appellee and concluded by Mr. Charles E. Magoon for the Appellant. Thereupon the cause was submitted to the Court on the motion of the Appellee to strike the assignments of error and on the merits, upon the transcript of record, from said Circuit Court and the briefs of counsel filed herein.

And on the twenty-third day of January, A. D. 1896, in the record of the proceedings of said Circuit Court of Appeals, is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit. December Term, 1895.

Thursday, January 23, 1896.

Prentiss D. Cheney, Appellant,

No. 708. vs.

John S. Bilby, Appellee.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Now comes the Appellee by his counsel and by leave of court files reply brief to the supplemental brief of the Appellant heretofore filed herein.

And on the thirteenth day of April, A. D. 1896, an opinion of said United States Circuit Court of Appeals was filed in said cause in the following words, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 708.—DECEMBER TERM, A. D. 1895.

Prentiss D. Cheney, Appellant,
vs.
John S. Bilby, Appellee.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Mr. Charles E. Magoon for Appellant.
Mr. James W. Hamilton and Mr. Samuel Maxwell (Mr. George B. Lake and Mr. Henry E. Maxwell were with them on the brief) for Appellee.

Before CALDWELL, SANBORN and THAYER, Circuit Judges.

STATEMENT.

This suit was begun on the second day of December, 1892, by John S. Bilby, the appellee, against Prentiss D. Cheney, the appellant, and arises out of the following contract:

"This indenture, made this 2d day of May, in the year of our Lord one thousand eight hundred and eighty-one, between Prentiss D. Cheney of Jerseyville, Jersey County, Illinois, party of the first part, and John A. Wisherd, of Nodaway County, Missouri, party of the second part, Witnesseth:

"That in consideration of the stipulations herein contained and the payments to be made as herein specified, the first party doth by these presents demise and let to the second party the possession and use of the land herein mentioned to the said second party said premises, situate and being in the County of Gage, in the State of Nebraska, known and described as follows, to-wit:

All of section one, town five, range seven, being	646.28
All of section twenty-four, town six, range seven, being	640.
All of section nine, town six, range eight, being	640.
Northeast quarter sect. five, town five, range seven, being	164.42
Fractional west half sect. six, town five, range eight, being	124.51
In acres a total of	2215.21

"The sum agreed upon for the possession, use, occupancy and control of said land is $2792.37/100, yearly, which is represented and included in the notes executed by said second party described herein, and also the whole amount of the taxes that are or may be assessed against said land. The purchase price of said land is fifteen thousand five hundred and six and 47/100 dollars, of which payment has been made of four hundred and twelve and 55/100 dollars, at the execution of this contract. The balance is to be paid, without notice or demand therefor, in ten annual payments, at the times specified in eighteen certain promissory notes, of even date herewith signed by John A. Wisherd payable to the order of P. D. Cheney.

"One note being for 1886.73/100 dollars, due three years after date.

"One note being for 1886.73/100 dollars, due four years after date.

"One note being for 1886.73/100, due five years after date, and five other notes for 1886.73/100 each due in six, seven, eight, nine and ten years after date, which eight are the principal notes, the other ten notes being for the yearly interest, viz.: first note, $905.63/100; second note, $905.63/100; third note, $905.63/100; fourth note, $792.43/100; fifth note, $679.23/100; sixth note, $566.03/100; seventh note, $452.83/100; eighth note, $339.63/100; ninth note, $226.43/100; tenth note, $113.23/100; due consecutively in one, two, three, four, five, six, seven, eight, nine and ten years after date, all payable at the office of Russell & Holmes in Tecumseh, Neb., without interest before due, and with ten per cent per annum after maturity. And the said second party, in consideration of this agreement, hereby agrees to make punctual payment of the above sums of principal and interest as each of the same respectively becomes due, and will also regularly and seasonably pay all the taxes and assessments against said land.

"Wisherd contracts and agrees to break one-third of each of the five tracts described, in season of 1881.

"Wisherd contracts and agrees to build six dwelling houses at proper points within one year from date, which dwelling houses shall be good and suitable for dwelling purposes and to cost not less than $250 each.

"Cheney is to pay taxes of 1880 and to warrant against all former years taxes.

"Wisherd is to pay taxes of 1881, and all subsequent years.

"In case the second party, his legal representatives or assigns shall pay the several sums of money aforesaid punctually and at the times above limited, and shall strictly perform all and singular the agreements and stipulations aforesaid after their true tenor and intent, then the said first party covenant and agree to make and execute unto the said second party, his heirs or assigns (upon request and the surrender of this contract), a deed conveying said land in fee simple, with the ordinary covenants of warranty—reserving and excepting the right of way that may be demanded for public use for railways or common roads; and it is hereby agreed and covenanted by the parties hereto that time and punctuality are material and essential ingredients in this contract.

"And in case the second party shall fail to pay the taxes, or if the land shall be sold for taxes, or if said second party shall fail to make the payments of money for principal or interest, or to make improvements as herein agreed, upon the terms and at the times herein limited and to perform and complete all and each of the payments, agreements and stipulations herein mentioned, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become null and void, and all the rights and interests hereby created or then existing in favor of the said party or derived from him, shall utterly cease and determine, and the right of possession and all equitable and legal interests in the premises shall revert to and revest in said first party, without any declaration or forfeiture, or any act of re-entry, or any other act of said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed. And in case of the forfeiture or the annulling of this contract, the said second party shall still be bound and liable to pay all taxes then due or assessed against said land, also all installments of principal or interest that may then be due on this contract to be regarded and considered as rent for the use of said land. Also no fixtures or improvements, temporary or permanent, shall be removed from said land.

"And the said first party shall have the right, immediately upon the failure of the second party to comply with the stipulations herein, to enter upon the land aforesaid and take immediate possession thereof, together with all the fixtures, privileges and appurtenances thereon or in any wise thereunto belonging or appertaining. And the said second party hereby covenants and agrees to surrender unto the said first party, or his order or his assigns, the said land and appurtenances without delay or hindrance; and no Court shall relieve the said second party from a failure to comply strictly and literally with this contract, and this instrument shall not be regarded or construed as color of title.

"No modification or change of this contract can be made except by entry hereon in writing signed by both parties. An oversight or omission of the first party to take notice of any default of the second party shall not be deemed a waiver of their right so to do at any time thereafter.

"And it is further stipulated that no assignment of the premises, or of this contract, shall be valid unless with the written consent of the first party, and by the endorsement of the assignment hereon.

"Time is hereby declared by the parties hereto to be the essence of this contract, and a failure on the part of the second party to make the payments mentioned, to do and perform all the covenants, to comply with all the agreements herein expressed, and by him agreed to be performed strictly according to the terms, boundaries and limits of the time herein mentioned, or either or any of them, fully and completely, shall immediately work forfeiture of all the right and claim of the said party of the second part to have a conveyance of the land herein mentioned.

"And in case of default the said second party binds himself and representatives to give up immediate possession of all said tract of land, whenever a demand is made therefor by the said party of the first part or their legal representatives. And upon the non-performance of the covenants herein mentioned or a failure to make the payments as herein specified, or any of them, at the time promised, all the rights and privileges provided in this contract, giving to said second party the right to purchase the land mentioned, shall immediately terminate.

"The rights of the second party hereunder shall be the rights of a tenant, and he shall hold the land under this contract as a lease, and he shall be liable and subject as a tenant under the statute regulating the relations between landlord and tenant and in case of default, the first party may enforce the provisions of this contract, and also recover possession of the land with all the fixtures, privileges, crops and appurtenances thereon; and in case of default, the action of forcible detainer shall lie against said party of the second part or his legal representatives herein.

"In testimony whereof, the said party of the first part has signed these presents in duplicate, and the second party has hereunto set his signature, the day of the date hereof. JOHN A. WISHERD."

The bill sets out this contract and avers performance and tender of performance by Wisherd and the complainant of all the covenants and stipulations of the same; pleads specially the tender of payment of all of the purchase money notes at their maturity and the tender of $19,512 to pay the last notes which matured May 2, 1891, and the principal of the other unpaid notes which matured prior to that date; offers to bring into court as the court may direct "all moneys due the said Cheney by said contract and notes, and offers to do equity in every respect as to this honorable court shall seem just"; avers "that on the 13th day of February, 1889, your orator for a valuable consideration purchased the said equity of the said Wisherd in said land and obtained a quit-claim deed therefor, and also an assignment of the said contract from the said Wisherd, and undertook and agreed to perform all and singular the obligations and payments of the money due the said Cheney from the said Wisherd under said contract of purchase"; alleges that on the twenty-ninth day of May, 1891, Cheney brought actions of ejectment to recover the possession of the land, and prays that he may be enjoined from prosecuting these actions and that Cheney may be decreed to make complainant a deed for the land.

The answer admits the execution of the contract and that Cheney agreed to sell Wisherd the land in controversy on the terms specified in the contract; alleges that default was made in the payment of each and every one of the purchase money notes which matured on and after May 2, 1884, and "That by reason of said defaults said contract became forfeited, null and void at the option of this respondent, Prentiss D. Cheney."

"That immediately after each default in said payments by said John A. Wisherd, this respondent notified the said Wisherd that he elected to declare said contract void and did declare said contract forfeited

and void. * * * That this respondent does now declare said contract forfeited, null and void"; and this declaration is many times repeated in the answer; alleges that "Wisherd and said Bilby allowed said land to be sold for taxes on the 6th day of November, 1893, at which time the said premises were duly sold for taxes for the years of 1891 and 1892" and that by reason thereof, the contract became null and void; avers that the forfeiture of Wisherd's rights under the contract was well "known to the complainant John S. Bilby for a long time prior to the pretended purchase by him and the assignment of said contract and of the pretended purchase by him of the alleged interest of the said John A. Wisherd in said land, and were well and fully known by John S. Bilby long prior to the 13th day of February, 1889." And alleges that "by reason of such knowledge the said John S. Bilby, complainant, is estopped and ought not to have and maintain his alleged cause of action in his said bill of complaint set forth and by reason of such estoppel is not entitled to the relief prayed for in his said bill of complaint. * * * And this respondent alleges that he has never at any time consented to the assignment of the premises or of said contract to the said complainant John S. Bilby or any other person, and that if said contract has been assigned or the said Wisherd's rights thereunder by the said John A. Wisherd to the said John S. Bilby or other person, it has been without the consent of this respondent"; and concludes with a prayer that the "contract shall be declared forfeited, null and void."

A year after filing the first answer, an amended answer was filed which answered the averments of the bill in relation to the tender of the purchase money as follows: "This respondent further answering says that said complainant ought not to have or maintain his said plea of tender of payment of the amount due under said contract at the time said payments became due for the reason that said complainant did not and has not kept good said pretended and alleged payments and did not and has not deposited said sums in any place or bank where this defendant could secure the same upon application therefor and has not set aside and did not keep set aside or separate and distinct, moneys or funds at any time or any place where this defendant could secure the same in satisfaction of said payments so due and owing, and said complainant has not brought the amount of said alleged tenders nor the amount of said payments so past due into Court and deposited the same in Court or elsewhere for the use and benefit of this defendant, or where this defendant might or could secure the same, and has made no tender or profert thereof of said sum or any sum in this Court or elsewhere for the use and benefit of this defendant."

The amended answer also sets up a claim for $521.95 paid to redeem the land from a sale for taxes for the year 1892, and concludes with a prayer that the contract "be declared forfeited, null and void." The court below found the issues of fact in favor of the complainant and rendered a decree as prayed for in the bill. The decree required the complainant within thirty days from the date thereof to pay to Cheney or into Court for his use the $19,512 due on the notes and $561.70

the amount of certain taxes on the land paid by Cheney, and these sums were desposited in court accordingly.

Cheney denied that Wisherd tendered payment of the notes which matured May 2, 1884, and on May 30, 1884, wrote Russell & Holmes the following letter:

"ATCHISON, KANSAS, May 30, 1884.

"Messrs. Russell & Holmes.

"Gents: Yours of 28th recd. saying that you have no word from J. A. Wisherd.

"There was due from him the first part of this month some $2800 on a land contract payable at your office.

"If you do hear from him and he offers to pay, I authorize and request you to say to him for me that I will not take the money. That his contract terminated by his failure to pay or offer payment when due and I do not and shall not recognize the contract as binding me to convey the land. I do not know his address or I would write to him.

"The payment of the money would have been a great convenience and accommodation and benefit to me during the financial panic. I propose to know from the highest law authority whether I am entitled to the benefits of the contract or not.

Yours truly,

P. D. CHENEY."

Cheney thereupon declared the contract forfeited and brought his action of ejectment to recover possession of the land and wrote Wisherd the following letter:

"P. D. Cheney, Jerseyville, Illinois.

June 16th, 1884.

John A. Wisherd, Esq.

Dear Sir: My contract of May 2d, 1881, to sell you,

All section	1.	5.	7.
"	24.	6.	7.
"	9.	6.	8.
N. W. ¼	5.	5.	7.
Fractional W. ½	6.	5.	8.

a total of 2215 37/100 acres in Gage County, Nebraska, became null and void and was terminated by your failure to pay the installments due May 2d, 1884,

1 of	$1886.73
1 of	905.63

I will return the unpaid promissory notes on demand or will deposit them for your use and benefit with any third person you will name.

I also ask and demand possession of the land and the stipulated sum of $2792.37 as the yearly rent of same.

Yours truly,

P. D. CHENEY."

To this letter Wisherd replied as follows:

"OMAHA, NEBRASKA, July 9, 1884.

P. D. Cheney, Esqr.
Jerseyville, Ills.

Dear Sir: Yours of June 19th received and contents noted and in reply I will say that when my notes became due to you May 2d, 1884, at the office of Russell & Holmes, Tecumseh, Neb. I sent my brother there prepared to pay them and instructed to do so, but the notes were not there. I have since that time been there myself prepared to pay them and offered to do so and have been ready every day since they were due and am ready now to pay them if you will notify me when they will be there at Russell & Holmes' office, there is where I shall expect to find each note as it becomes due and on the day it becomes due you can get your money for each and every one of them, until that time I have no use for the notes unless you should prefer to take all your

money due you on principal notes at a reasonable discount and make me a deed now. In that event I could and would pay it all to you, but that is optional with you. If you should wish to do anything of the kind, name the discount you would be willing to give.

Very respectfully yours,
JOHN A. WISHERD,
Nodaway Co., Dawson, Mo."

On July 14, 1884, Cheney wrote Wisherd as follows:

"P. D. Cheney,
JERSEYVILLE, ILLINOIS, July 14th, 1884.

John A. Wisherd,
Dawson, Nodaway Co., Mo.

Dear Sir:—Enclosed I return you 16 notes, all dated May 2d, 1881, given to me by you as a part of the land contract of same date for the sale and purchase of,

All section	1.	5.	7.
"	24.	6.	7.
"	9.	6.	8.
N. E. 1/4	5.	5.	7.
Fract'l W. 1/2	6.	5.	8.

being 225 21/100 acres in Gage County, Nebraska.

"As you know, the Contract of Sale became null and void was terminated and ended by your failure to comply with its terms—I have been unable until now to know with certainty your proper address or I would have returned the notes sooner.

Yours truly,
P. D. CHENEY."

To this letter Wisherd replied as follows:

"DAWSON, MO., July 21st, 1884.

P. D. Cheney, Esqr.
Jerseyville, Ills.

Dear Sir:—Yours containing my notes given to you for the purchase money of Gage Co. Neb. land received. I herewith return them to you, I will give you the money for the two notes which were due May 2nd. 1884 just as soon as they are presented to me for payment, the other notes are not due yet and until they are due I have no use for them.

Very respectfully yours,
JOHN A. WISHERD,
Nodaway Co., Dawson, Mo."

Other correspondence and facts appear in the opinion. Cheney brought the case into this court by appeal.

CALDWELL, J., after stating the case as above, delivered the opinion of the court.

The transaction between Cheney and Wisherd was the very simple one of the sale by the former to the latter, mostly on credit, of a tract of wild land. As simple in itself, as the transaction was, the written instrument expressing it is an extremely voluminous document imposing on the purchaser numerous and unusual, stringent and oppressive conditions, all of which are required to be "strictly and literally" performed by the purchaser on pain of forfeiting the land and all improvements, fixtures thereon and all the purchase money paid and all that may be due when the forfeiture is declared, and also the crops that may then be growing on the land. Time is twice declared to be "the

essence of this contract," in respect of every one of its numerous provisions, and it is further declared that "no court shall relieve the said second party from a failure to comply strictly and literally with this contract"; and that "an oversight or omission of the first party to take notice of any default of the second party shall not be deemed a waiver of the right to do so at any time thereafter."

In the number, severity and stringency of its provisions as applied to the purchaser, the contract is without a precedent in our judicial experience outside of the cases in which similar contracts made by Cheney with other persons have given rise to law suits and have been made the subject, to a greater or less extent, of judicial consideration. We cite some of these cases: *Wagner* v. *Cheney*, 16 Neb. 202; *Robinson* v. *Cheney*, 17 Neb. 673; *Roberts* v. *Cheney*, 17 Neb. 681; *Ballard* v. *Cheney*, 19 Neb. 58; *Svaboda* v. *Cheney*, 28 Fed. Rep. 500; *Cheney* v. *Bacon*, 1 C. C. A. 244, 49 Fed. Rep. 305; *Cheney* v. *Libby*, 134 U. S. 68.

However harsh and exacting the contract may be, Cheney is entitled to the full benefit of its provisions, and we have only called attention to some of them because they disclose a motive and afford an explanation for Cheney's subsequent conduct.

We will proceed to consider the several grounds upon which Cheney rests his defense to the bill for specific performance. The first ground relied on in the answer is that the contract is "forfeited, null and void by reason of the non-payment of the notes given for the purchase money as they severally matured." These notes by the terms of the contract and by their own terms were payable at the office of Russell & Holmes, Tecumseh, Nebraska. Wisherd paid as part of the purchase price for the land $412.55 at the date of the execution of the contract, and he also paid at maturity the first two interest notes due respectively May 2, 1882, and May 2, 1883, each for the sum of $905.63. Before May 2, 1884, the date of the maturity of the first principal and the third interest note, Wisherd had placed improvements on the land valued at $20,000. When the last mentioned notes matured, Wisherd tendered payment of the same at the office of Russell & Holmes at Tecumseh, Nebraska, where they were payable, but Russell & Holmes not having the notes declined to receive the money. Cheney denied that a legal tender had been made of the money due on these notes, declared the contract forfeited and instituted an action of ejectment to recover the land. This ejectment suit was tried and decided against Cheney in the Circuit Court of the United States for the District of Nebraska on the fifth day of February, 1887. The case was then taken on writ of error by Cheney to the Supreme Court of the United States, where it was pending until the fifth day of January, 1891, when it was dismissed on Cheney's motion. By this action the judgment in this ejectment suit became final, and is conclusive against the claim of Cheney that Wisherd had forfeited his rights under the contract by failing to tender payment of the notes which matured May 2, 1884. From the time Cheney brought the action of ejectment in 1884, to enforce the alleged forfeiture and recover the land, down to

the seventeenth of May, 1890, he asserted that due tender of payment of the notes which matured May 2, 1884, had not been made and that the contract was null and void. He refused to accept payment of the other purchase money notes as they matured or to otherwise recognize the contract as in force. Cheney's action rendered it manifest that it was not payment of the notes he desired, but a forfeiture of the contract. Wisherd, perceiving that it was Cheney's purpose to enforce "strictly and literally" the sweeping forfeitures provided for in the contract if the slightest ground was afforded him for so doing, was put upon his guard and was at great pains and considerable expense to comply strictly and literally with the terms of the contract.

Nothwithstanding Cheney's persistent declaration that the contract was forfeited and null and void, Wisherd continued to tender payment of the other purchase money notes as they matured at the place where they were made payable. On the third of March, 1890, the Supreme Court of the United States decided the case of *Cheney* (the same Cheney who is appellant in this case) v. *Libby*, 134 U. S. 68. That was a suit to compel specific performance by Cheney of a written contract similar to the one in suit, for the sale by him to Libby of land in Nebraska. The facts upon which the complainant in that case grounded his claim for specific performance, so far as they relate to the action of Cheney, bear a strong analogy to the facts in this case. Fourteen days after the Supreme Court of the United States handed down its opinion in that case, Cheney abandoned his claim to a forfeiture growing out of the alleged non-payment of any of the notes which matured prior to May 17, 1890, as will be seen by the following letters written by him on that day:

"Tecumseh National Bank,
Successor to Bank of Russell & Holmes.
TECUMSEH, NEB., May 17, 1890.

C. A. Holmes, Esq.,
Prest. Tecumseh, Neb.

"Dear Sir:—Herewith I hand you for colln. & my Cr. 14 past due notes of J. A. Wisherd, all dated May 2/81, viz: (here follows a particular description of each note) all drawing ten per cent interest after due.

If Mr. Wisherd will pay same you will please receive payment therefor for me. Mr. Wisherd to pay the full amount of principal and ten per cent interest on each of the 14 notes, according to their terms.

You will not receive any part payment on the notes or on any of them. I require full payment of all the notes.

Yours truly,
P. D CHENEY,
of Jerseyville, Ill."

On the same day he wrote the following letter to Wisherd:

" Tecumseh National Bank.
Successor to Bank of Russell & Holmes.
TECUMSEH, NEB., May 17, 1890.

John A. Wisherd, Esq.,
Adams, Neb.

Dear Sir:—You are hereby notified that I have this day left at this Bank your 14 past due notes, which you can get by paying the amount due thereon within a reasonable time.

Yours truly,
P. D. CHENEY."

Within a reasonable time after the receipt of this letter Wisherd caused to be tendered the principal sum on the 14 past due notes. Interest thereon after maturity was not included because payment of the notes had been tendered at the maturity of each. Cheney was advised of this tender by the following letter from his agent:

"Tecumseh National Bank.
Successor to Bank of Russell & Holmes,
TECUMSEH, NEB., May 29, 1890.

P. D. Cheney, Esq.,
Jerseyville, Ill.

Dear Sir:—At 4 o'clock this afternoon the cashier of the First National Bank of Lincoln, Neb., called at this bank and offered to pay the 14 notes of J. A. Wisherd which you left here for collection May 17, 1890; that is he made a tender of $17,512.00 and demanded the notes, claiming that was the amount Mr. Wisherd instructed him to tender and to pay the same upon surrender of the notes. As the amount was not sufficient to cover the interest and principal we declined to surrender the notes or accept the money in payment of them and hold the notes subject to your further instructions.

Yours truly,
C. A. HOLMES, Pt."

The next and last notes fell due on the second of May, 1891, and on that day the complainant caused to be tendered at the place where the notes were payable the amount of the notes which matured on that day and also the principal of the notes which had previously matured and payment of which had been tendered as they matured—the whole sum tendered amounting to $19,512. The response of Cheney's agent to this tender was as follows:

"Tecumseh National Bank,
(Successor to Bank of Russell & Holmes).
TECUMSEH, NEB., May 2d, 1891.

O. Callihan, Esq.
Cashier.

Dear Sir: We decline to accept the tender this day made by you of $19,512.00 for J. A. Wisherd to pay certain notes given to P. D. Cheney under contract for sale of lands, for the reason that we are not authorized by P. D. Cheney to accept the money nor have we the notes in our possession nor the deed to the premises for which notes are claimed to have been given.

Respectfully,
RUSSELL & HOLMES,
By C. A. Holmes."

On the same day the bank wrote Cheney as follows:

"Tecumseh National Bank,
(Successor to Bank of Russell & Holmes).
TECUMSEH, NEB., May 2d, 1891.

P. D. Cheney, Esq.
Jerseyville, Ill.

Dear Sir: The Cashier of the First Nat'l Bank of Lincoln, Neb. has this day made a tender of ($19,512.00) nineteen thousand five hundred and twelve dollars for J. A. Wisherd to pay certain notes described in a contract dated May 2d, 1881, between you and said Wisherd; demanded the notes and a deed to the lands described in the contract. The tender and demand was made to me as one of the firm of Russell & Holmes and also as an officer of this bank.

Yours truly,
C. A. HOLMES, Pt."

Cheney refused to accept this tender because it did not include interest on the over-due notes, tender of payment of which had been made at their maturity, and on the sixth of May, 1891, again declared the contract forfeited, null and void, and again sent the notes to Wisherd, and on the twenty-ninth of the same month instituted four suits in ejectment to recover the land.

It would serve no useful purpose to set out at length the evidence showing that payment of all the notes was tendered at their maturity at the place where they were made payable. It is enough to say that we find this to be the fact from a careful reading of the evidence. If the fact was doubtful we should, according to a well-settled rule, resolve the doubt in favor of the findings of the lower court. In *Fitchett* v. *Blows*, ——— Fed. Rep. ——— (present term), Judge Sanborn speaking for the court said: "When the court below has considered conflicting evidence and made its finding and decree thereon, they must be taken to be presumptively correct and unless an obvious error has intervened in the application of the law or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand." *Warren* v. *Burt*, 12 U. S. App. 491, 7 C. C. A. 105, 58 Fed. Rep. 101; *Paxson* v. *Brown*, 27 U. S. App. 49, 10 C. C. A. 135, 61 Fed. Rep. 874; *Stuart* v. *Hayden*, 72 Fed. Rep. 402; *Kimberly* v. *Arms*, 129 U. S. 512; *Evans* v. *Bank*, 141 U. S. 107; *Furrer* v. *Ferris*, 145 U. S. 132.

If this last claim of forfeiture relied on by Cheney is well founded, he is entitled to the land with all improvements, fixtures and growing crops and to the purchase money and taxes already paid, and in addition thereto he is entitled to collect the whole of the unpaid purchase money, the contract providing that in case of forfeiture the purchaser shall be bound and liable to pay "all installments of principal or interest that may then be due," and they were all due at the date of this alleged forfeiture.

It will be perceived, therefore, that the determination of the question whether Cheney was entitled to interest upon notes, payment of which had been duly tendered, involves much more than the sum of that interest. When Cheney abandoned his claim to the first alleged forfeiture and notified Wisherd that he was willing to accept payment of the past-due notes, it was Wisherd's legal duty to pay or tender payment of the same within a reasonable time. He made a tender of the principal of the notes within a reasonable time and renewed that tender at the maturity of the last notes, but in neither instance did he tender interest on the notes after their maturity, claiming that he was not liable therefor by reason of having tendered payment of the notes at their maturity. If he was mistaken in this claim, then he was in default, and by the terms of the contract, Cheney had a right to declare the forfeiture which he did on the sixth of May, 1891, and is entitled to recover, at law, the land and improvements and the whole of the purchase money with interest.

In *Cheney* v. *Libby*, 134 U. S. 68, 73, the Supreme Court of the United States said: "But it is quite apparent from the evidence that

Cheney in 1885 indulged the hope that he could bring about a forfeiture of the contract for non-compliance on the part of Libby with its provisions, and that he would, in that or some other way, get back the land." In this case it is apparent that the stringent clauses of forfeiture in this contract were put there by Cheney with the deliberate and fixed purpose of availing himself of them as soon as it would profit him to do so and there was the slightest default upon which to predicate a claim of forfeiture. Accordingly, as soon as Wisherd had placed $20,000 worth of improvements on the land, he declared the contract forfeited and brought suit for the land. It is now conclusively settled that this claim of forfeiture was false and unfounded, but it took six years to demonstrate this fact. During all that time the burden was imposed on Wisherd and the complainant of raising money to pay, or, to tender payment of the notes given for the land in the face of Cheney's continued declaration to the public that the contract was forfeited, and the land his. Cheney's conduct and attitude multiplied the already heavy burdens of an unconscionable contract. His declaration that the contract was forfeited, his denial of Wisherd's right to the land, and his bringing the suit to recover it, necessarily impaired Wisherd's credit and made it more difficult and burdensome for him to raise the money to pay or tender payment of the notes as they matured. It is a maxim that a man must be held to have contemplated the necessary result of his action. Cheney must have known how embarrassing and burdensome his action was to Wisherd. He evidently hoped it would utterly destroy his credit and put it out of his power to raise money to pay or tender payment of the purchase money notes as they matured. For, while he had in 1884 declared the contract forfeited and brought suit for the land and was refusing to accept payment of the notes, he nevertheless was keeping a close watch to see whether Wisherd tendered payment of the notes at the appointed time and place, intending if there was the slightest failure to comply "literally" with the contract in this regard, to make such failure a distinct and additional ground of forfeiture. And under one pretense and another, he did declare a forfeiture at each recurring period of payment.

In *Svaboda* v. *Cheney*, 28 Fed. Rep. 503, Mr. Justice Brewer, then circuit judge, said: "Where there has been as in this case, part performance, and a forfeiture of all that has been paid and done is insisted upon, a court of equity instinctively turns to the party insisting upon the forfeiture, and inquires whether his conduct fails in the slightest degree. And in this it is not limited to the mere letter of the contract. There are often unwritten obligations which, if disregarded justify a refusal of the claim of forfeiture. And the more inequitable the demand, the grosser the wrong in insisting upon a forfeiture the more closely will a court scrutinize the conduct, and the smaller the departure from written or unwritten obligations which will be deemed sufficient to justify a refusal of the forfeiture."

Cheney was entitled to the benefit of his contract however harsh and unconscionable its provisions, but he had no right to base an unfounded

or groundless claim of forfeiture upon it, in the hope of thereby bringing about a forfeiture, or the necessary tendency of which was to make performance more difficult or the contract less useful or valuable to the purchaser. The language of Cockburn, C. J., in *Frost* v. *Knight*, L. R. 7 Ex. 111, 114, is appropriate here. The learned chief justice said: "The promisee has an inchoate right to the performance of the bargain which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantages the repudiation of the contract by the other party and the announcement that it never will be fulfilled, must of course deprive him." Upon the soundest principles of equity and fair dealing, Cheney is estopped on the facts of this case from claiming interest on the notes after tender of payment. To hold that he was entitled to interest on the money tendered would, as we have seen, be tantamount to giving him both the land and the whole of the purchase money. This would be giving one a princely reward for his own misconduct. Equity abhors forfeitures and will not concern itself to make good the loss of interest to one who refused the principal in the hope that he could enforce upon purely technical grounds a forfeiture so harsh and sweeping in its character as to shock the moral sense. When he refused payment of the principal of the notes, and, in the hope of winning a great stake, asserted a conscienceless forfeiture which he could not maintain, even in a court of law, he put the interest on the money tendered to the hazard. He chanced it and lost.

The case of *Hart* v. *Brand*, 1 A. K. Marshall, 117, 118, fully supports our conclusion. That was a suit to compel the specific performance of a contract to convey land, and the seller's conduct and defense were very much the same as that of the appellant in this case, as will appear from reading the full report of the case. On the subject of interest the court said: "With respect to interest: No proposition can be more clear, that if the purchaser were really and *bona fide* prepared to make payment, and intended to do so, free from all shuffling, equivocation, and technical quibble; and the vendor has ever since evinced a determination not to perform the contract, if possible, having never given notice to the vendee when to attend on the premises and receive possession—that he is not entitled to interest. In other words, that one holding himself in readiness to pay, and the other refusing to do what the contract enjoined upon him, ought to subject the latter to the loss of interest, and not the former. The wrong was with him, and he cannot charge the effect to the other.

"And as to cost, it is equally clear that the decree is correct. Why the incurment of cost? Because the benefit of the contract could not be otherwise obtained. This is demonstrable, not only from the other evidence in the cause, but from the answer also. To have tendered the money or demanded possession under the circumstances, would have been an idle show of form and ceremony. If the

defendant intended to comply, by receiving the money and delivering the land, why did he not rest his defense as to the cost upon this ground, without resorting to points evidently for a different purpose? The *real object* was clearly to get clear of the bargain; and the *next*, to secure interest and cost. It is impossible not to perceive, from the whole evidence, that this was the object; and, if possible, to make the experiment at the expense of the purchaser, upon misapplied rules of rigid technical pleading."

Independently of the misconduct of Cheney, upon the well-settled rule he is not entitled to interest upon the money tendered. A case precisely in point is *Ward* v. *Smith*, 7 Wall. 447, where the court said: "It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank, when due, to receive payment and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay."

In *Cheney* v. *Libby*, *supra*, the court held, "The defendant (Cheney) is not entitled to interest after the respective tenders were made because it does not appear that the plaintiff has, since the tenders, realized any interest upon the moneys left by him for Cheney at the bank of Russell & Holmes." Neither Wisherd nor the complainant realized any interest on the money tendered.

In *Davis* v. *Parker*, 14 Allen, 94, 104, the supreme judicial court of Massachusetts say: "After a tender and refusal, the vendor is not entitled to interest unless he can show that the purchaser has made use of the money or gained some advantage from it. 2 Sudg. on Vend. 793. No such evidence has been offered in this case."

In *Peugh* v. *Davis*, 113 U. S. 542, the supreme court said: "Nothing hindered during all this time that he should pay his money; and if, as he alleges, Davis denied his right to do so, then he should have made a regular and lawful tender of the amount due. If he had done so, the interest would have ceased to run against him and the amount that he is now required to pay would have been diminished by more than one-half."

It is objected against the sufficiency of the tender to stop interest that Wisherd and the complainant did not set aside and hold subject to the order of Cheney the money tendered. This objection was made in *Curtis* v. *Greenbanks*, 24 Vt. 536, 540, and answering it the court said: "It has also been objected, that this tender is of no avail, from the fact that the money paid into court was not the identical money previously offered or tendered. And it has been insisted that to keep a tender good, the party must keep the identical money offered, ready

to be paid over, on demand, or in a proper time, to pay the same in court. This principle, whatever may be the rule in relation to the tender of specific articles, can have no application to the tender of money, or that which the parties have treated as equivalent to the current coin of the country. It is to be borne in mind, that a tender of money does not extinguish the debt. It simply bars the claim to damages and interest and the costs of an action, if the matter is prosecuted. By the tender, if refused, the money does not become the property of the person to whom the tender is made. Hence, the person tendering is at liberty to use it as his own, all he is under obligation to do, is to be ready at all times to pay the debt in current money, when requested."

The next contention of the appellant is, that conceding that Wisherd could enforce specific performance of the contract, the complainant, as his assignee or vendee, cannot. This contention is rested on the clause of the contract "that no assignment of the premises or of this contract shall be valid unless with the written consent of the first party and by the endorsement of the assignment hereon." This restraint upon the power of the purchaser to assign the contract unquestionably expired when the last purchase money note fell due and complete performance of the contract was tendered by the complainant. The complainant's right to a deed then became absolute. From that time the seller was a mere naked trustee of the legal title and the purchaser or his vendee the equitable owner of the land. It was no longer any concern of the seller what the beneficial owner of the land did with it, for he no longer had any interest in it. The purchaser had the right to convey his equitable title or assign his contract to whom he pleased without asking Cheney's consent, and his vendee would succeed to all his rights. For the purpose of this case, it is immaterial that the sale or assignment was made before the complete performance of the contract by the purchaser or his vendee, for it was ratified and confirmed at all times thereafter and at and after complete performance had been tendered by the complainant, when, if not before, it unquestionably became operative.

This provision of the contract was obviously intended to prevent the assignment of the same, while it was executory to persons who might not be able or well disposed to faithfully execute it. It was a provision which was inserted in the agreement to enable Cheney, the vendor, to control the selection of an assignee thereof so long as the agreement remained in part unperformed, or so long as he was interested in the choice of an assignee who had the requisite means and ability to do what remained to be done. Inasmuch, then, as the provision in question was only intended to secure the faithful performance of the agreement by the purchaser or his assignee, it would be both unreasonable and inequitable to hold that Cheney, the vendor, is privileged to take advantage of the provision, to avoid performance on his part, after the entire amount of the purchase money has been promptly paid or tendered. We must assume, whatever may be the fact in this regard, that the provision against assigning the contract without the vendor's

consent, was inserted therein for an honest and legitimate purpose; that is to say, for the purpose of securing the punctual payment of the purchase money and a full compliance with other executory agreements, either by the original purchaser or by his assignee. Therefore, when it appears that that object has been accomplished, that the purchase money has been promptly paid or tendered to the vendor, and that nothing remains to be done but to execute a deed to the purchaser, the vendor cannot be heard to allege as an excuse for not making a conveyance, that at a certain time the purchaser of the land assigned the contract of purchase without his consent. It would be trifling with justice to tolerate a defense of that character after the purchaser's engagements have each been performed in the time and manner stipulated in the contract of sale. Moreover, if Cheney intended to take advantage of the alleged breach of this provision of the contract, he should have made the fact known when the final payment for the land was tendered by the complainant. The evidence shows, however, that he did not decline to accept the final payment when the same was tendered, on the ground that the contract had been wrongfully assigned and that he was under no obligation to accept payment from an assignee thereof; on the contrary, he refused the tender for the sole and only reason that the amount tendered was insufficient. Such an action on his part, we think, may well be regarded as a waiver of all objections to the assignment, as well as a waiver of the defense which he now undertakes to make.

The views which we have thus expressed on this branch of the case are the same, in substance, that we find stated in a little different form in the case of *Wagner* v. *Cheney*, 16 Neb. 202. It appears in that case that a suit was brought against the present appellant, Cheney, for specific performance, on a contract couched in the same language and containing the same provision against an assignment without his consent as that which figures in the present controversy. He attempted in that case, as in this, to avoid the execution of a deed after the terms of the purchase had been fully performed, on the ground that the contract had been assigned by the original purchaser without his consent. But the Supreme Court of Nebraska said, in substance, that as the contract did not provide in terms that a breach of the provision should work a forfeiture of the purchaser's interest in the land or impose a penalty for its breach, no advantage could be taken of the breach, by the vendor, in a suit to compel the execution of a deed, after the terms of the purchase had been fully complied with by the purchaser or his assignee. It is also worthy of notice that the appellant, Cheney, is himself a lawyer, and that in the case of *Cheney* v. *Bacon*, 49 Fed. Rep. 305, which was formerly pending in this court, and in which Cheney acted as his own counsel, he invoked the decision in *Wagner* v. *Cheney*, *supra*, as containing a correct exposition of the law touching the scope and effect of that provision of the contract which is now under consideration. We did not find it necessary in that case to consider the point, and therefore expressed no opinion thereon at that time.

We think, therefore, that we may adopt the view expressed by the Supreme Court of Nebraska, for the reasons heretofore indicated, and apply the same to the decision of the case in hand, with the confident assurance that it is right in principle, and will promote the ends of justice.

It is objected that there is no sufficient evidence of the sale of the land and an assignment of the contract by Wisherd to the complainant, and that Wisherd should have been made a party defendant to the suit. The bill alleges that Wisherd sold the complainant his interest in the land and made him a quit-claim deed therefor, and assigned to him the contract. Tested by the settled rules of equity pleading, the answer does not deny these allegations. Storys Eq. Pl. 852, 854; *Woods* v. *Morrell*, 1 Johnson, Chan. 107; *Reed* v. *Cumberland Ins. Co.*, 36 N. J. Eq. 146, 153. But the sale is abundantly proved independently of the quit-claim deed. It is proved by the depositions of Wisherd and the complainant which are a part of the record in the case. The written declaration, under oath, of Wisherd and the complainant that the sale was made and that they desire that effect be given to it, is, in equity, as effectual to transfer Wisherd's equitable right in the property to the complainant as if the sale had been evidenced by the most formal written instrument, and entitles the complainant to the same equitable remedies against the appellant to perfect his title that Wisherd could have asserted if no sale had been made. Whether this sale was evidenced by a deed or an assignment of the contract or rested on a parol agreement, is no concern of the appellant so long as the parties to it are agreed that it was made and have asserted the fact upon the record in a mode that will estop them from asserting, at any time, the contrary against the appellant.

To the objection that Wisherd should have been made a party defendant, there are several answers. As we have seen, the fact of the assignment is not denied, but only its legal effect; it is absolute and leaves no interest in the assignor; the objection, if good, was apparent on the face of the bill and was not taken by plea or demurrer; such an objection raised at the hearing is never regarded if a decree can be rendered without prejudice to the rights of the party objecting, or the absent party, and, as we have seen in this case, on the state of the record, the rights of the appellant are as fully protected as if Wisherd was a party defendant. The modern codes of practice adopt the equity rules in relation to parties to suits. Under those codes, one suing as assignee of a chose in action, not assignable by statute, is required to make the assignor a party as plaintiff or defendant; but, notwithstanding this requirement, it is uniformly held that the assignor may be dispensed with as a party, where, by his deposition in the case or otherwise, he admits the fact of his assignment and disclaims any interest in the controversy; and where the assignment is absolute and unconditional, the objection that the assignor is not made a party is waived when not insisted upon by demurrer or answer. Nash Pl. & Prac. pp. 30, 43; Swan Pl. & Prac. 102 and note c; Newman Pl. & Prac. 182, 214; *Colyer Adm.* v. *Craig*, 11 Ben. Mon. 73; *Johnson* v.

Rankin, 3 Bibb. 87; *Keller* v. *Beeler*, 5 Mon. 575; *Du Vall* v. *Waggener*, 2 Ben. Mon. 184.

It is next objected that the money tendered was not brought into court upon the filing of the bill. But it was tendered in the bill and an offer made to bring it into court whenever the court should so direct and this was sufficient. *Cheney* v. *Libby*, *supra*; Pomeroy on Contracts, Sec. 361.

After Cheney began his actions of ejectment for the land in 1894, he paid the taxes for one year and he has a decree for the amount with interest, which is all that need be said on that subject.

Finding no error in the record, the decree of the circuit court is, in all things,

Affirmed.

Filed April 13, 1896.

[redacted]

[redacted]

[redacted]

357 And on the thirteenth day of April, A. D. 1896, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit. December Term, 1895.

Monday, April 13, 1896.

Prentiss D. Cheney, Appellant,

No. 708. vs.

John S. Bilby, Appellee.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that John S. Bilby have and recover against Prentiss D. Cheney the sum of twenty dollars for his costs herein and have execution therefor.

April 13, 1896.

And on the first day of May A. D. 1896, there was filed in the Clerk's office of said Circuit Court of Appeals a petition for rehearing in said cause in words and figures following, to wit:

United States Circuit Court of Appeals.

FOR THE EIGHTH CIRCUIT.

December Term, 1895.

No. 708.

PRENTISS D. CHENEY, Appellant,

vs.

JOHN S. BILBY, Appellee.

PETITION AND REASONS FOR A REHEARING.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Prentiss D. Cheney, appellant in the above entitled action, respectfully petitions the court for a rehearing therein, for the following reasons:

1. The opinion of the Court seems to be based on the truth of the allegation made by the complainant below in his bill, wherein he alleged that on February 13th, 1889, Bilby purchased the equity in said land and obtained a quit-claim deed therefor, and *also an assignment* of the said contract from said Wisherd. (See p. 3 of Transcript.)

The record shows that said contract was in the possession of Wisherd, and it was therefore impossible for Cheney to know whether it had or had not been assigned as alleged.

The *Answer* therefore averred the stipulation against assignment, and alleges that if said contract has been assigned it has been done without the consent of the respondent Cheney. (See p. 297.)

The complainant Bilby introduced testimony to support the allegations of his bill. Upon this question he was sworn as a witness and testified that the quit-claim deed constituted the transfer and conveyance of the interest of Wisherd to him. (See p. 170.)

The quit-claim deed was also offered in evidence and is shown on p. 197.

The contract held by Wisherd was also introduced in evidence by complainant Bilby (see p. 189), but no assignment of any kind is entered thereon.

Hereupon the appellant, Cheney, insists that the complainant, Bilby, failed to prove the most important allegation in his bill. Not only did he fail to prove it affirmatively to be true, as he had alleged, but his own testimony and exhibits demonstrated that the contract never had been assigned to him.

We respectfully urge this Court to consider that Bilby did not allege that although the contract had not in fact been assigned to him, yet he was ready and had always been ready to comply with the terms thereof, and therefore he prayed for relief.

We ask your Honors to again examine the stipulation against assignment and note that it provides that no assignment shall be valid unless with the written consent of Cheney and by the *indorsement of the assignment hereon;* which stipulation, if carried out, would effectually prevent an assignment to some person unknown to

Cheney. The stipulation denied the power or right of Wisherd to sell without giving notice to Cheney. The contract was not subject to sale like a negotiable promissory note would have been. Yet commercial paper may be and often is issued, shorn and deprived of its negotiable quality.

We respectfully ask this Court to examine the doctrine governing such assignments promulgated by the Supreme Court of the United States as announced in Arkansas Smelting Co. vs. Belden Co., 127 U. S. 387, where it was said:

"Contracts may be assigned, unless there is a stipulation which manifests the intention of the parties that it shall not be assignable.

"Every one has a right to select and determine with whom he will contract, and cannot have another person *thrust* upon him without his consent."

The above paragraph was quoted and approved in Delaware Co. vs. Diebold Safe Co., 133 U. S. 488, and again in Burck vs. Taylor, 152 U. S. 634.

Applying the above cited authority, we show to this Court that in the contract under consideration "*there is* a stipulation which manifests the intention of the parties that it *shall not be assignable.*"

The petitioner contends that the requirement laid down by the Supreme Court is fulfilled, and thereby he is protected from "*having another person thrust upon him without his consent,*" as Justice Gray expressed it in 127 U. S. 387.

The complainant, Bilby, did not allege in his bill that Cheney had consented to the assignment, although such consent was under the stipulation quite as necessary as the written assignment.

Thus the strongest case that can possibly be conceived here exists and is shown to this Court, where

a party—Cheney—has been denied the right to select and determine with whom he will contract, and has had another person—Bilby—*thrust upon him* without his consent, in violation of the express stipulation, which manifests the intention of the parties that the contract shall not be assignable.

Notwithstanding all which, this Court has announced in the opinion filed herein April 13th, 1896, that the sale is abundantly proved independently of the quit-claim deed by the depositions of Wisherd and of the complainant, which are a part of the record in this case.

We earnestly urge upon your Honors that this does not meet the demand that the complainant shall prove the allegations of his bill wherein he claimed that he had an assignment; neither does it meet the requirements of the stipulation, which provided that another person should not be thrust upon Cheney without his knowledge and consent.

The position taken by this Court, to the effect that Cheney waived all objection to the assignment from Wisherd to Bilby, is manifestly untenable when it is shown that Bilby had not made any demand or claim upon Cheney, nor did Bilby ever make himself known as a claimant to the contract or the land involved until he filed this bill on December 2d, 1892, which was one year and seven months after the commencement of ejectment by Cheney in May, 1891.

Bilby neglected to prosecute his suit by obtaining either actual or constructive service until Cheney voluntarily entered his appearance and filed his answer on March 20th, 1894.

Every transaction, offer to pay or tender of money made at the office of Russell & Holmes was by Wisherd in person or by the officers of the First National Bank of Lincoln, for and on behalf of Wisherd; never at any

time was any offer made by or on behalf of Bilby. All the money borrowed from the First National Bank, for *three days* use, with which to make the alleged tenders, was borrowed by Wisherd; when said bank expected to make the final tender, in 1891, they *wrote to Wisherd* (p. 84).

The bank officers said they would pay Cheney $19,512 upon his surrendering to them the Wisherd notes with a deed for the land.

The deed prepared by Cheney to be delivered was made to Wisherd. (See p. 272.) Bilby was unknown in the transactions; his name was not mentioned as a beneficiary entitled to rights under this contract.

Whenever Bilby's name appeared it was only in the capacity of drawing drafts or checks for Wisherd's benefit. Bilby never, at any time, made any movement or demonstration hostile to Cheney's contract until December 2d, 1892, when he filed this bill.

The opinion filed herein plainly states the doctrine that Bilby, having tendered a sufficient sum is entitled to a conveyance of the land, the same as Wisherd would have been had he fully performed and not sold his claim; that as the entire purchase price had been tendered, the contract had been completed and restraint upon sale could not longer be insisted upon by Cheney.

But your Honors seem to have overlooked the fact that the only pretense of assignment was the quit-claim deed of February 13th, 1889, and that the alleged tenders made thereafter, in May, 1889, in May 1890, and in May, 1891, were made by or on behalf of Wisherd.

The necesrary and inevitable result is that if the sums tendered were sufficient to complete the equitable title it must be in favor of Wisherd. Such title, therefore, would have been complete on May 5th, 1891, and

after being so completed (*which pretense we deny*), there would not exist any valid reason why Wisherd should not sell and convey.

But there are no such facts in this case. The quit-claim deed was made more than two years prior to the limit of time fixed for final payment, and the conveyance of the land. It is not in harmony with the established and accepted rules to say that a quit-claim deed will pass an after-acquired title.

At the date of such quit-claim deed, on February 13th, 1889, Wisherd had no title, equitable or legal. The contract did not create an equitable title in Wisherd. It was only a contract that might or might not ripen into an equitable title. This question is fully explained in Chappell vs. McKnight, 108 Ill. 570, and again in Walters vs. Walters, 132 Ill. 481, where it was said: "A mere contract to convey at a future time upon performance by the purchaser, does not create an equitable title. When the purchaser performs all acts necessary to entitle him to a deed, then, and not till then, he has an equitable title and may compel a conveyance."

It must be plain that a quit-claim deed only conveys such interest as the grantor had at the date of its execution, and after-acquired title will not inure to the benefit of the grantee.

As Wisherd did not have the equitable title on February 13th, 1889, it was impossible for him to convey such title to Bilby. The equitable interest (*if any*) owned by Wisherd on February 13th, 1889, could not be transferred to any person by a quit-claim deed without Cheney's knowledge and consent, as the contract, which was the foundation of any right Wisherd had, forbids such assignments.

Evidently this Court has failed to notice or consider that Cheney had no knowledge of the alleged assignment at the time of these several alleged tenders, until after the last tender made in May, 1891. (See p. 238, 239, printed Record.)

Johnson vs. Vandervoort, 16 Neb. 149.

We insist that the quit-claim deed of February 13, 1889, from Wisherd to Bilby is not an assignment and cannot confer upon Bilby any right that Cheney is bound to recognize.

Such an equity in real property is not assignable or available in the hands of an assignee. It was so declared in Johnson vs. Vandervoort, 16 Neb. 149:

"What passed to the plaintiff by virtue of this deed from Mary Jane Akers on January 20, 1882? Certainly not a legal title. * * * Such equity as she had is not assignable. * * * There is no pretense of an assignment. * * * There being no title in the grantor, none passed to him."

In principle the case is precisely analogous to the case at bar. Disregarding the lapse of time the court said: Such an equity is not assignable. "But be that as it may, there is *no pretense of an assignment* of a chose in action. The plaintiff's case rests solely upon whatever might pass by virtue of a deed of real property." There being no title in *Wisherd* none passed to *Bilby*.

It is not alleged in the bill, or attempted to be shown by the evidence, or claimed in the briefs, that Cheney knew of the alleged assignment. The exact contrary is shown. The persons who made the tenders each state that they were made for Wisherd.

The letters written by Russell & Holmes to Cheney state that tenders have been made for Wisherd. (See Exhibits B, C, D, E, G, I, pp. 41 to 44, printed

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The letters written by Russell & Holmes to Cheney state that tenders have been made for Wisherd. (See Exhibits B, C, D, E, G, I, pp. 41 to 44, printed

Record.) The letters were offered on behalf of the complainant, and contain all the information that is sought to be shown Cheney possessed and all he did receive. (See p. 240 printed Record.)

Knowledge is essential to a waiver. Unless the party acts with knowledge, there cannot be a waiver.

"A waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it."

Livesey vs. Omaha Hotel Co., 5 Neb. 69.

This Court cites Wagner vs. Cheney, 16 Neb. 202, as an authority to uphold the claim that the contract might lawfully be assigned, as the assignee had fully performed. Evidently this Court has overlooked the fact presented by counsel in the oral argument, that the decree in that case was obtained by fraud, as is fully shown in Cheney vs. Wagner, 33 Neb. 310.

On p. 313 Judge Maxwell denounced as fraudulent the conduct of Wagner, who deposited money with Russell & Holmes with which to pay for the land, and upon being granted a decree Wagner immediately withdrew his money. The decree affirmed in 16 Neb. 202 was based upon the theory that when Wagner left money with Russell & Holmes, his own agents, that it was a payment; but in truth, the money remained under Wagner's control and he chose to withdraw it as soon as he had accomplished his fraudulent design.

We think we are justified in objecting to the use of this fraudulent decree to show inequitable conduct on the part of Cheney.

Your Honors cite Cheney vs. Bacon, 4 U. S. Appeal 207, also found in 49 Fed. Reporter 305. Judge Caldwell therein said : The assignments of error averring an assignment to Clark are not well founded in fact.

The testimony shows the complainant did, at one time, desire to assign the contract to Clark, and that he put an indorsement on it to that effect and sent it to the respondent—Cheney—for his approval *as required by the contract*, but the respondent refused to approve the assignment and thereupon the transfer was abandoned.

We think it is evident that your Honors must have overlooked the real turning point in the above case decided by this Court, construing the effect of precisely the same prohibition against assignment. The conclusion seems to be irresistible and unavoidable, that as the refusal of Cheney to consent prevented the consummation of the transfer from Bacon to Clark because such approval *was required by the contract*, it ought to be impossible for the same court to decide in the case now at bar that Cheney's consent was unnecessary or immaterial to give validity to an assignment through the mediums of a quit-claim deed executed more than two years prior to the maturity of the contract.

We respectfully suggest that the criticism upon the insufficiency of the respondent's answer is not sound, for the reason that a defendant is only bound to answer such matter in a bill as is well pleaded.

Story Eq. Pl., Sec. 846.

To the complainant's allegation that he had received a quit-claim deed and *also* an assignment, the respondent answered that if he had received an assignment it had been without the consent of respondent.

As the contract was in the possession of Wisherd, Cheney could not know the exact fact respecting it; he therefore answered fully in relation to all the knowledge he had. When the contract was produced in evidence it was without any semblance of assignment, and it was fully demonstrated that the complainant's

bill was not true and that the answer fully met and denied the allegation of assignment.

Surely it cannot be held that an untrue allegation is a fact well pleaded.

We insist that it was error for this Court to hold that it was unnecessary that Wisherd should have been made a party defendant to the complainant's bill. There is no authority that can be cited to uphold such omission, but the weight of authority demanding it is irresistible, viz.:

Story Eq. Pl. Sec. 153: Where the validity of the assignment is disputed the assignor is not only a proper but a necessary party.

Cheney's answer disputed the validity of the assignment alleged, because if made, it was made without Cheney's consent.

Kendall vs. U. S., 7 Wall. 113: A disputed claim cannot be so assigned as to give the assignee an equitable right. "Before any claim can be assigned so as to confer on the assignee an *equitable* right, it must be of some definite property in the hands of a person who *admits his obligation* to the assignor.

When this rule is applied to the case at bar, it appears that Cheney disputed the right of Wisherd before the quit-claim deed to Bilby was made.

Cheney vs. Bacon, 1 U. S. C. C. A. 244: The contract prohibited assignment without license; the court held that Cheney had refused to consent *as required by the contract* and affirmed the decree made on the circuit by Judge Riner.

This opinion in this case was by Caldwell, J.

Osgood vs. Artt, 17 Fed. Rep. 578: By Harlan, Justice.—"Words of assignment and transfer in a separate instrument will not be operative to transfer title to

an assignee, it having been stipulated in the bond that the notes were to be transferable in connection with the bond and *not otherwise*."

Christmas vs. Russell, 14 Wall. 69: "To make an equitable assignment valid there must be a complete and present right conferred. If the assignor retains control over the subject-matter, it is fatal to the transaction as an equitable assignment."

Applying the above authority, we ask this Court to notice that notwithstanding his quit-claim deed, Wisherd retained control over the contract which was not assigned, and he had it in his power to execute an assignment to any other person, which would have been complete by securing Cheney's consent thereto. Also, that Wisherd continued to make yearly tenders to Russell & Holmes after the date of his quit-claim deed to Bilby. Also, that on May 2d, 1891, Callahan tendered $19,512 to Russell & Holmes for Wisherd. (See Exhibit I, page 44; also, Exhibit C, May 2d, 1891, page 116, transcript; also, see Exhibit D., May 8th, 1889, page 42, where P. S. Chapman, for *Wisherd*, tendered $2,226.36 and then produced the Wisherd contract; also, Exhibit G, May 29th, 1890, page 43, where cashier of said bank tendered $17,512, the amount Wisherd instructed him to tender.)

Cook vs. Bidwell, 8 Fed. Rep. 456: Acheson, Judge. —In all cases where an assignment does not pass the legal title and where there are remaining rights or liberties of the assignor, he is a *necessary* party. Cites Story, Eq. Pl., Sec. 153.

Tiernan vs. Jackson, 5 Peters (U. S.) 597: If a chose in action is assigned and the contractor promises to pay the assignee, the latter may maintain action. Inde-

pendently of such promise there is no pretense that an action can be sustained.

In examining the case last above cited, the petitioner respectfully asks this Court to notice that Cheney never, at any time, promised to fulfill in favor of Bilby.

McCord vs. U. S., 9 Ct. of Claims 155: Where an alleged assignee does not produce the transfer, the assignment will be deemed void. If the purchaser has assigned the contract, the action against the vendor for specific performance should be by the assignee making the original purchaser a defendant.

Fales vs. Mayberry, 2 Gallison 560: Story, J.—"If a chose in action, not assignable, be assigned, the contract may be set up as a defense, as if there had been no assignment."

Betton vs. Williams, 4 Florida 11: Where the extent or validity of the assignment is disputed, then the assignor is a *necessary* party. Cites Story, Eq. Pl. Sec. 153.

The Court clearly states in the opinion that the stipulation against assignment was inserted to secure payment of the purchase price by whomsoever it might be offered. This view has been advanced many times heretofore, but has been overruled by courts of the highest standing. We ask permission to cite the following, viz.: 2 Story Eq. Jur. Sec. 1324. It is clearly established that equity will not interfere in cases of forfeiture for a breach of a covenant not to assign a lease.

"There is much ingenuity in attempting to assimilate a contract of this kind to a mortgage, but the analogy *will not hold*. In a mortgage, the only object is to secure the payment of money. In a land contract, one great

object is a transfer of the estate." (Rummington vs. Kelley, 7 Ohio, part 2, p. 104; Id. 432, 440.)

Kleinhaus vs. Jones, 68 Fed. Rep. 749;
Gray vs. Tubbs, 43 California 364.

"If it appears that the parties have contracted, courts of equity will not disregard the contract in order to give effect to some vague surmise that all the vendor intended was to secure the payment of the purchase money."

In Wells vs. Smith, 2 Edwards Ch. 87, bill by vendee against vendor on a contract for sale of land, the court said:

"Vendee claims that the contract was in effect a sale and a mortgage back for the purchase money; that vendor holds the contract *as security* for the payment of the money. * * * But the title did not pass. * * * No estate is vested in vendee."

Further explaining, the court said that if the parties had intended a mortgage, they would have executed one. The difference between covenants in a contract and a mortgage is fully explained.

That a contract for the sale of land is not a mortgage or a security for the payment of money, was held by Chancellor Kent in Benedict vs. Lynch, 1 Johnson Ch. p. 374. He said: "The case is not analogous to that of a mortgage, where the only oject of the security is the payment of money and not the transfer of an estate."

That Cheney can object to this alleged assignment, made without his *knowledge* as well as without his *consent*, without showing damage, is absolutely established by Bracebridge vs. Buckley, 2 Price 200; Hill vs. Barclay, 18 Vesey 56; Wafer vs. Mocato, 9 Modern Reports 112. And further, by the fact that the stipulation

was not made to secure the payment of money, but, on the contrary, was made to restrain and prevent an act being done. (Dunklee vs. Adams, 20 Vermont 420; cites 2 Story Eq. Sec. 1324; cites Wafer vs. Mocato.)

In Hill vs. Barclay, 18 Vesey 56, Lord Eldon, after a full discussion of the law that such stipulations are valid, says, on page 63:

"He cannot show that the lessor *sustains no damage.* * * * It is sufficient that the lessor insists upon his covenant. No one has a right to put him in a different situation. The distinction is made that relief may be had against a covenant to pay money, but not where anything else is to be done." (See same case, 16 Vesey 405.)

In Wafer vs. Mocato, 9 Modern Reports, 112, it was held: "Compensation could not be made for the breach of a covenant *not to assign.* * * * The Court will not relieve where there is no rule of damages, *to avoid* being arbitrary."

NOTICE WAS NOT GIVEN.

The following cited authorities show that complainant Bilby would not be entitled to the decree he asks for, even if the prohibition against assignment had been omitted from the contract as made on May 2, 1881, for the reason that no notice of any assignment was given to Cheney; the courts declare such notice to be indispensable.

We present a case directly in point, decided by the chancery court of England, Shaw vs. Foster (1872), L. Reports, 5 House Lords, 321:

"The persons who claim the benefit of an assignment must give distinct notice to the vendor of their claim."

The case occupies thirty-seven pages, giving a very full and clear statement of the facts and circumstances.

Lord Chelmsford states the case on page 334: Respondent Foster contracted to sell leasehold interest in land to Pooley; Pooley, being indebted to a bank, deposited the contract with the bank as security; no notice was given to Foster until four months thereafter. Page 333: Lord Chelmsford asserts that the rule is applicable, and holds:

"If notice had been given to Foster of the assignment he would have been bound by it."

Page 343: "No notice of any kind was given Foster till July thereafter."

Page 350: "It is not a case between the immediate contracting parties. The rights of a sub-contractor against the vendor are not those of the person from whom he derives. He is not in direct privity with the vendor; *to become so* he *must give* proper notice of it."

This case is entitled to great consideration. It was decided wholly on the ground that the assignee neglected to give notice of the assignment to the vendor. No mention is made of any stipulation against assignment. Apparently there was no restriction. It therefrom appears that any party accepting an assignment of a contract to convey any estate in land should immediately give notice thereof to the vendor.

We say, on the authority of this case—Shaw vs. Foster—that Bilby could not enforce this contract against Cheney, even if the prohibition did not exist.

Notice *must be given* to the vendor that the contract has been assigned. (See 2 Addison on Contracts, Sec. 532 (1876).)

The above authority is concerning "Assignment of contract to purchase land."

"The assignee, before he can claim to have his interest protected, must prove both the fact of the assign-

ment and *notice*." (Davenport vs. Woodbridge, 8 Maine, 19.)

"Assignment of contract to purchase land." (2 Addison, Cont. (1883), book 2, chapter 7, bottom page 418.) Vendor must have notice of the assignment before he can be bound to the assignee. (Cites L. R., 5 H. L. 321; Shaw vs. Foster.)

The stipulation was reasonable, so that Cheney might know who held his contract; that he might know who had a right to pay money under the contract.

TENDER.

The Court in the opinion say:

"Upon the soundest principles of equity and fair dealing, Cheney is estopped on the facts of this case from claiming interest on the notes after tender of payment."

The Court has failed to consider that during all this period Wisherd, or his privies, has been in possession of this land. This is a vital point in the contention regarding interest. For this reason the case of Hart vs. Brand, 1 A. K. Marshall, 117, 118, is not in point. In that case the person claiming interest had also had possession and the rents and profits.

The same thing is true in the case of Davis vs. Parker, 14 Allen 94, 101. In that case the defendant controlled the management of the land and prevented the plaintiff from realizing any profits therefrom.

In the case at bar, Cheney has not been in possession and the rents and profits have been received and retained by Wisherd.

Two recent cases upon the proposition that tender must be kept good in order to stop interest and costs are the following: McCauley vs. Leavitt, 37 Pac. Rep. 164; Burlock vs. Cross, 26 Pac. Rep. 142.

In McCauley vs. Leavitt the court say:

"The place of payment was a matter of arrangement between the makers and payee for their mutual accommodation. The payee did not agree to have the note at the bank on the date of maturity, but simply that it should be payable there. Hence the mere failure to present it for payment there on the date of maturity did not exonerate the makers from their promise to pay according to the terms of the note. Nor would it prevent the payee from recovering his interest and costs, in the absence of a readiness on the part of the makers, at the time and place appointed, to pay the note. If on or before the day of maturity the makers would have deposited the money with the bank for the payment of the note in full on presentation, or if, on the day of maturity, they had called at the bank, and made a valid tender of the money, and demanded the note, then such deposit or tender, if it had been kept good, would have prevented the payee from recovering interest after maturity, as well as costs of suit. There being no such deposit or tender, and no valid tender after maturity, the payee was entitled to recover, in accordance with the terms of the contract, the amount due on the note at the time of suit. (Story, Prom. Notes, Sec. 228; Hills vs. Place, 48 N. Y. 520; Wallace vs. McConnell, 13 Pet. 136; Washington vs. Bank, 1 How. (Miss.) 230.)" (37 Pac. Rep. 164.)

The language used by the Court in this case as above quoted is taken verbatim from the language of the Supreme Court of the United States in Wallace vs. McConnell, 13 Pet. 136.

In Burlock vs. Cross, the Court say:

"The obligation to keep the tender good is as essential to the legal efficacy of the tender as the offer of the money itself." (26 Pac. Rep. 142.)

The Federal Court for the Northern District of Illinois, in the celebrated case known as the "Lake Front case," speaking by Justice Harlan of the Supreme Court of the United States, say:

"If the tender of the first installment of $200,000 to the comptroller was binding upon the city, the subsequent return of the money to the railroad companies at their request deprived them of whatever benefit accrued from that tender, leaving them in the attitude of never having performed the conditions upon which they were to acquire title to those lands." (State of Illinois vs. Illinois Central R. Co., 33 Fed. Rep., 730-776.)

"The creditor is not bound to accept a tender made by a stranger." (Gibson vs. Lyon, 115 U. S. 439.)

The petitioner insists that this case decided by the U. S. Supreme Court ought to protect him from assaults made by Bilby, who is a stranger thrust upon Cheney without his knowledge or consent.

"The creditor did not consent to receive this money in payment, and *without such consent* there could be no payment." (Kingston Bank vs. Gay, 19 Barbour, 460.)

"Payment is the discharge of a contract, in which one party has a right to demand payment and the other party *has a right to make payment.*" (See Daniel, Neg. Inst., Sec. 1221.)

Bouvier says:

"Payment must be made by a person who has *the right to make it*, to a person who is entitled to receive it."

A payment may be valid, because made by a person *not entitled to make it.* (Story on Prom. Notes, Secs. 373, 374, 375.)

"Payment on a note should be made directly to the holder and legal proprietor of it, and the benefits and

rights of payment *accrue* to the one who was *compellable* to pay." (Parsons on Bills, p. 208.)

It would therefore seem that the correct rule is the one laid down by the recent case of Sanders vs. Bryer, 152 Mass. 141-143, wherein the Court say:

"The vendee cannot be entitled to the use both of the land and of the money which is the consideration to be paid for it. 'The act of taking possession,' it is said in 2 Sugd. Vend. (8th Am. Ed.) 317, 'is an implied agreement to pay interest; for so absurd an agreement as that the purchaser was to receive the rents, to which he had no legal title, and the vendor was not to have interest, as he had no legal title to the money, could never be implied.'" (152 Mass., 141-143.)

In Bissell vs. Hayward the United States Supreme Court say:

"One of the statements of fact in the case sets forth that Bissell tendered the money; and fails to state that he deposited, or in any manner set it apart or appropriated it for the purpose of the tender. The other states that he used the money he had thus provided. The legal effect is the same. To have the effect of stopping interest and costs, a tender must be kept good; and ceases to have that effect when the money is used by the debtor for other purposes." (96 U. S. 587, and authorities there cited.)

In Crescent Min. Co. vs. Wasatch Co. the Supreme Court of the United States say:

"It is no hardship that the Crescent Company, which had both the use of the money and the receipt of the issues and profits of the mines, should be charged with interest for the period between the maturity of the mortgage and the payment into court." (151 U. S. 318-323.)

The case of Cheney vs. Libby, 134 U. S. 68, is not in point to sustain the contention that interest cannot be recovered herein. In that case the court say:

"The defendant is not entitled to interest after the respective tenders were made, because it does not appear that the plaintiff has, since the tenders, realized any interest upon the *moneys left by him for Cheney at the bank of Russell & Holmes.*

An examination of the case will show that the bank of Russell & Holmes was the place of payment fixed in the notes. That Libby deposited the money in said bank for the use and benefit of Cheney. In the case at bar, no money was deposited in the bank where the notes were made payable, and none was deposited anywhere for that matter. Wisherd would borrow the amount of money necessary to pay the principal of the notes from the First National Bank of Lincoln, and immediately return the money to the bank to which it belonged, and would pay the bank for a three days' loan. This is all that ever took place after 1887.

In the opinion herein the court says, "Neither Wisherd nor the complainant realized any interest on the money tendered." Opinion p. 14.

This is true for the very good reason that never for a minute or a day were they entitled to interest. The bank never parted with the possession of the money. The bank always sent the money by the hands of one of its employes, and had it returned the same way. The money was the money of the bank, used by it as such and being such in fact. This presents a very different question from that of a man taking his own money and depositing it in the bank of payment and leaving it there, as Libby did.

"If it be shown that the party making the tender borrowed the money to be used for that express purpose,

and immediately returned it to the lender, this will avoid the tender."

Park vs. Wiley, 67 Ala. 310.

In passing upon the sufficiency of the alleged tenders herein, the court has failed to consider that the said tenders were *conditional*. For instance, that of May 4th 1889, was conditioned upon compliance with a demand for the notes. See Exhibit D, p. 42, printed record.

The alleged tender of May 29, 1890, was accompanied by a demand for the notes, and conditioned "upon surrender of the notes." See Exhibit G. p. 43, printed record.

The alleged tender of May 2, 1891, was conditioned upon the surrender of the notes and the execution and delivery of a deed to the lands. See question 116, p. 36, printed record.

"A tender with a condition annexed to its acceptance, is invalid: as, that the creditor shall give a receipt, or surrender a security or obligation upon which the money is tendered."

Holton vs. Brown, 18 Vt. 224;
Draper vs. Hitt, 43 Vt. 224;
Preston vs. Grant, 34 Vt. 201;
Foster vs. Drew, 39 Vt. 51.

"The tender is invalidated by a demand that the party to whom it is made make title."

Cotheran vs. Scanlon, 34 Ga. 556.
Kelsey vs. Crowther, 7 Utah, 519.

The demand for a surrender of the notes is equivalent to a demand that the tender be accepted in full payment. This also invalidates the tender. In discussing this question the Supreme Court of Nebraska, speaking by Lake, J., say:

"A *tender* is defined to be the offer of a sum of money in satisfaction of a debt or claim, and showing the amount due the creditor or party claiming and expressing verbally a willingness to pay it. (Worcester.) 'The tender must be unconditional.' (Brown's Law Dictionary, 352.) Thus, although a party who tenders money has a right to exclude any presumption against himself, that the sum tendered is in part payment of the debt; yet, if he add a condition that the party who receives the money shall acknowledge that no more is due, this will invalidate the tender. (Chitty on Contracts, 699, marginal.) And in Wood vs. Hitchcock, 20 Wend. 47, it was held that a tender of money in payment of a debt, to be available, must be without qualification; that is, there must not be anything raising the implication that the debtor intended to cut off or bar a claim for any amount beyond the sum tendered; and it was accordingly held that the tender of a sum *in full discharge* of all demands of the creditor was not good. In this case Cowen, J., said: 'It was clearly a tender to be accepted as the whole balance due, which is holden bad by all the books.' The reason of this rule is manifest, for if the tender be of a sum as *all that is due*, that being disputed, and the creditor receives it, under these circumstances it might compromise his rights in seeking to recover more, whereas, if the same sum were tendered *unconditionally*, no such effect could follow." (Tompkins vs. Batie, 11 Neb. 147-153.)

This Honorable Court seems impressed with the conviction that Cheney by declaring a forfeiture of the contract impaired the credit of *Wisherd*. If the averments of the complainant's bill are true, and the law is as contended by the complainant, *Wisherd* had no interest in

this contract after 1889. The contract then belonged to John S. Bilby. The proof is plenary that the contract was in 1887 assigned to the First National Bank of Lincoln, Neb., and has never been re-assigned by that bank to any person whomsoever. See p. 76.

If the question of Wisherd's ability to borrow money is material herein, then attention is called to the testimony of Wisherd on that point; which testimony the court seems to have overlooked. Speaking of the way in which Bilby paid him for the land in question, Wisherd says:

"Q. You can state about when you did receive the consideration, whether it was in cash or what way? A. I received it shortly after the sale of the land in credit on my indebtedness whith Mr. Bilby.

Q. About how much were you owing him at that time? A. I can't give that accurately, but to the best of my recollection, I was owing J. S. Bilby and the bank of J. S. & J. E. Bilby & Co., about one hundred twenty-four or five thousand dollars, principal due J. S. Bilby; that is the best of my recollection."

(See printed record p. 163.)

On cross-examination Wisherd, testified:

"Q. For what did you become indebted to Mr. Bilby in the sum of over $100,000.00? A. It was for the purchase money of lands that I bought of him together with accumulated interest and money furnished at different times for the improvement of the lands and for notes that he had bought from other parties, and money furnished for cattle, an accumulation of debts for a series of years.

Q. How many years? A. Running as far back as 1884, and possibly further, might have been some notes older than that.

Q. What became of the land out of which this indebtedness arose? A. The majority of it went back to him."

(See printed record, p. 168.)

It also appears from the bill of intervention of Susan B. Alden, together with the certified copy of the judgment in Alden vs. Wisherd, and the pleadings in that case, that Wisherd was able to further secure credit to the extent of $20,565.90, making a total of $145,565.90 indebtedness, which Wisherd was able to secure exclusive of his indebtedness to Cheney, after the declaration of forfeiture in 1884.

(See printed record, p. 12, also stipulation, pp. 303 to 312.)

In Nebraska this is an enormous indebtedness for an individual to acquire, and no man with an impaired credit is able to do so.

It is evidently true that the execution of the quitclaim deed from Wisherd to Bilby, on February 13th, 1889, had for its object the defeat of Susan B. Alden executrix, who had recovered a judgment against Wisherd for $20,565.90. This may fairly be taken as the motive for the irregular attempt to transfer the interest of Wisherd to Bilby.

For the reasons above given and many more that can be named, we earnestly but respectfully urge that a re-hearing be granted us.

Respectfuly submitted,

CHARLES E. MAGOON,

Counsel for Appellant, the Petitioner.

St. Louis, Mo., April 30th, 1896.

I, Chas. E. Magoon, of Lincoln, Nebraska, attorney at law and solicitor in chancery, admitted to practice by the United States Circuit Court of Appeals for the

Eighth Circuit, and by the Supreme Court of the United States, hereby certify that as counsel for the appellant, I have examined the record, the briefs of counsel, the opinion filed herein, April 13th, 1896, and the accompanying petition for a re-hearing, and thereupon I state to the Court that in my judgment said petition truly sets forth the facts of the case, with the law applicable thereto, and that a re-hearing should be granted to the appellant for the correction of error.

CHAS. E. MAGOON,
Counsel for Appellant.

Dated April 30th, 1896.

Endorsed:
Filed May 1, 1896.

383 And on the fourth day of May, A. D. 1896, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition for rehearing in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit. May Term, 1896.

Monday, May 4, 1896.

Prentiss D. Cheney, Appellant,

No. 708. vs.

John S. Bilby, Appellee.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard upon the petition for a rehearing and brief in support thereof filed by Counsel for Appellant herein.

On consideration whreof, it is now here ordered by this Court that said petition for a rehearing be and the same is hereby denied.

May 4, 1896.

384 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals, Eighth Circuit, do hereby certify that the foregoing 383 ——— pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said Circuit Court of Appeals, in the case of Prentiss D. Cheney, Appellant vs. John S. Bilby, Appellee, No. 708, December Term, 1895, as the same remain upon the files and records of said United States Circuit Court of Appeals.

United States,
Circuit Court
of Appeals,
Eighth Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals at the City of St. Paul, Minnesota, this Eighteenth day of May, A. D. 1896.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Office Supreme Court, U. S.
FILED.
JUL 18 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

164-705

No. 561

PRENTISS D. CHENEY,
Appellant,

v.

JOHN S. BILBY,
Appellee.

PETITION OF PRENTISS D. CHENEY FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CHAS. E. MAGOON,
Solicitor for Cheney.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

PRENTISS D. CHENEY, *Petitioner.* } No.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Eighth Circuit to Certify to the Supreme Court for Its Review and Determination the Case of Prentiss D. Cheney, Appellant, versus John S. Bilby, Appellee.

To the Honorable the Supreme Court of the United States:

The petition of Prentiss D. Cheney respectfully shows to this honorable court as follows:

I. This is an action in equity brought in the United States circuit court for the district of Nebraska, wherein John S. Bilby, complainant in the court below, sought to enforce the specific performance of a contract by and between Prentiss D. Cheney and John A. Wisherd, for the leasing and sale upon conditions of two thousand two hundred and fifteen acres of land situate in Gage county, Nebraska; and also to enjoin an action in ejectment theretofore instituted in said court by said Cheney against said Wisherd.

II. Upon the trial of said cause in the circuit court, a decree was entered in favor of the complainant Bilby awarding him specific performance of the contract upon the payment by him of the sum of $19,500, being the principal sum due under said contract without interest, and the further sum of $500, taxes paid by Cheney. Upon appeal to the United States circuit court of appeals for the eighth circuit, the decree of the lower court was affirmed.

III. A certified copy of the record and proceedings in the United States circuit court for the district of Nebraska, and in the United States circuit court of appeals for the eighth circuit, including the opinion and decree of the court, is filed herewith.

IV. The bill averred the contract between Cheney and Wisherd and alleged that Wisherd had assigned the contract to the complainant Bilby on February 13th, 1889, and also that Wisherd executed and delivered to Bilby a quitclaim deed to the land in question on the same date.

V. The contract between Cheney and Wisherd was entered into May 2d, 1881, and provides for the leasing of said lands for the period of ten years, and also for the payment in ten annual installments of the sum agreed upon as the purchase price. The contract did not mature, if all its conditions were complied with, until May 5th, 1891. The alleged assignment and the quitclaim deed, if made, were made before the completion of the contract and while the title remained in Cheney.

VI. The contract is the ordinary contract in use for such purpose, and contains, among other provisions, the following:

"No modification or change of this contract can be made except by entry hereon in writing, signed by both parties." "And it is further stipulated that no assignment of the premises, or of this contract, shall be valid unless with the written consent of the first party, and by indorsement of the assignment hereon." (See printed record, p. 264.)

VII. It is not alleged in the bill, nor attempted to be shown by the proof, or contended in argument, that Cheney ever waived this condition of the contract; nor is it claimed that he had any knowledge of the alleged assignment and quit-claim deed until this action was instituted.

VIII. The question thus presented is the validity of stipulations in a personal contract restricting assignment. That such stipulations are valid and will be enforced is the well established rule of this court. (Arkansas Smelting Co. v. Belden Co., 127 U. S., 379, 387; Delaware County v. Diebold Safe & Lock Co., 133 U. S., 473, 488; Burck v. Taylor, 152 U. S., 634, 649; Cincinnati Gas Co. v. Western Siemans Co., 152 U. S., 202. See, also, Meyer v. Ward, 87 Tex., 622; La Rue v. Groezinger, 84 Cal., 285.)

In Arkansas Smelting Co. v. Belden Co., 127 U. S., 379, the court say:

"The vital question in the case, therefore, is whether the contract between the defendant and Billing and Eilers was assignable by the latter, under the circumstances stated in complaint. At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the in-

tention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' (Humble v. Hunter, 12 Q. B., 310, 317; Winchester v. Howard, 97 Mass., 303, 305; Boston Ice Co. v. Potter, 123 Mass., 28; King v. Batterson, 13 R. I., 117, 120; Lansden v. McCarthy, 45 Mo., 106.) The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' (Pollock on Contracts (4th ed.), 425.)" (Arkansas Smelting Co. v. Belden Co., 127 U. S., 387.)

In Delaware County v. Diebold Safe & Lock Co., 133 U. S., 473, the court say:

"The real question in controversy is not one of the form of pleading, but whether the plaintiff has any beneficial interest as against the defendant in the contract sued on. A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract. (Arkansas Co. v. Bel-

den Co., 127 U. S., 379, 387, 388.)" (Delaware County v. Diebold Safe Co., 133 U. S., 488.)

In Burck v. Taylor, 152 U. S., 634, the court say :

"It is true that, in the case at bar, we have no construction of a statute, but only of the terms of a contract. That contract, however, was as binding on the one party as the other. The contractor assented to its terms precisely as did the state, and his promise was not to assign the contract in whole or in part without the consent in writing of the state authorities. It was a promise which entered into and became one of the terms of the contract, and one which was binding, not only upon the parties, but upon all others who sought to acquire rights in it. It may be conceded that, primarily, it was a provision intended, although not expressed, for the benefit of the state, and to protect it from interference by other parties in the performance of the contract, to secure the constant and sole service of a contractor with whom the state was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interests in the contract it had no previous knowledge, and to the acquisition of whose interests it had not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him."

Continuing the discussion the court further say:

"We have thus far rested the non-assignability of this contract, or any interest therein, to plaintiff's grantor upon the express stipulation of clause 26; but even in the absence of such a clause, it was not competent for Schnell, by his own act and without the consent of the state, the other contracting party, to transfer any interest in this contract. It is a contract of that nature which is not susceptible of

assignment without the consent of the other party. (Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S., 379; Delaware County v. Diebold Safe & Lock Co., 133 U. S., 473, 488.)"

The court then quote with approval the language above quoted from Delaware Co. v. Diebold Safe & Lock Co., 133 U. S., 488, and continuing say:

"So that even if clause 26 had been omitted from the contract, Schnell, the contractor, could never have transferred an interest in it to the grantor of plaintiff so as to vest in him a right to take part in the work, or a subsequent right to recover from the state on the completion of the work. All that could ever have been acquired by an assignment or transfer from Schnell, without the consent of the state, was a right to maintain an independent action against him for whatever share of the profits he had attempted to transfer." (Burck v. Taylor, 152 U. S., 649-652.)

Since these decisions were promulgated two state courts have adopted the view of the law therein expressed. (La Rue v. Groezinger, 84 Cal., 285; Meyer v. Ward, 87 Texas, 622.)

The Texas case, decided April 1, 1895, is conclusive herein. The case arose as follows: Menger leased certain lands to Schuele. The lease gave Schuele the right to buy the lands on making certain future payment. It also gave Schuele the right to sublet the premises. Schuele made valuable improvements on the land and then mortgaged the premises to Ward. He then surrendered the lease and executed a quitclaim to the premises to his grantor, Menger. Ward took possession and undertook to sell the plant under the mortgage. Menger sued out an injunction to restrain

the sale. One of the propositions presented to the court was as follows:

"The option to purchase, as contained in the lease from Menger to Schuele, could not be mortgaged or assigned without the consent of Menger."

Upon this point the court say:

"In all of the cases cited, and all that we have found which hold the doctrine that the assignment of the lease carries with it the privilege to purchase the property where that right is given to the lessee by the contract, the terms of purchase prescribed were for cash, or no terms of payment were fixed beforehand. In such case it might be consistently held that the privilege was not personal, for the reason that in the exercise of the right no new contractual relations would be created in case of cash payment, and in cases where no terms were fixed the owner of the land could make the payment cash if he did not choose to grant a credit, and thus the terms would be a matter of agreement."

"There is, however, an important principle in the law of contracts applicable to the facts of this case that distinguishes it from the cases cited, which is well stated thus: 'Rights arising out of contract cannot be transferred if they involve a relation of personal confidence such that the party whose agreement conferred these rights must have intended them to be exercised only by him in whom he actually confided.' (Pollock on Con. (4th ed.), p. 425; Lansden v. McCarthy, 45 Mo., 106; Arkansas Smelting Co. v. Belden Mining Co., 127 U. S., 379; Commissioners v. Safe and Lock Co., 133 U. S., 473; Burck v. Taylor, 152 U. S., 632.)"

"In the relation of debtor and creditor there is more than simply the financial ability of the debtor and the value of the security given; the character of the man is oftentimes worth more than his property as an assurance of prompt payment and security of that which he holds upon which the lien exists. But it is useless to speculate upon reasons

that might be assigned why a creditor might prefer one man to another as his debtor; it is his right to make his own contracts, with which courts cannot interfere except to enforce them as made."

"The result in this case would be not only that the assignee, Ward, could become a debtor to the lessor without his consent, but in case the property is sold at public sale under the mortgage, any one who might purchase would have the same right, and thus the owner of the property would by the judgment of the court be forced to make a contract with one not selected by and perhaps not known to him, to whom he must trust valuable rights for a period of three years." (Menger v. Ward, 87 Texas, 622, 626.)

The estate granted by the contract herein is equitable only. The restriction was, therefore, not repugnant to the limitation. An equitable estate may be made inalienable. This doctrine, denied at one time in certain states of America, has in the past ten years received universal approval. The supreme court of the United States hold that an equitable estate may be made inalienable. (Nichols v. Eaton, 91 U. S., 716, 725.)

The question has been raised in twenty-four states. Out of that number, twelve, to-wit, Pennsylvania, Massachusetts, Illinois, Maine, Maryland, Mississippi, Vermont, Missouri, Tennessee, Delaware, Indiana, and Virginia accept the doctrine. In Wisconsin, Connecticut, and Kentucky the decisions are conflicting. In Arkansas and New Jersey the adverse expressions are *dicta*. But a few years ago such restraints on an equitable estate were held good in but two states, Pennsylvania and Massachusetts. (Stambaugh's Estate, 135 Pa., 585; Braman v. Styles, 2 Pick., 460, 464; Broadway Bank v. Adams, 133 Mass., 170; Steib v. Whitehead, 111 Ill., 247; Roberts v. Stevens, 84 Me., 325; Smith v. Towers, 69 Md., 77; Maryland Grange v. Lee, 72 Md.,

161; Leigh v. Harrison, 69 Miss., 923; Barnes v. Dow, 59 Vt., 530; Lampert v. Haydel, 20 Mo. App., 616, 96 Mo, 439; Jourolmon v. Massengill, 86 Tenn., 81; Henson v. Wright, 88 Tenn., 501; Gray v. Corbit, 4 Del. Ch., 135; Camp v. Cleary, 76 Va., 140; Garland v. Garland, 87 Va., 758; White v. Thomas, 8 Bush (Ky.), 661; Leavitt v. Beirne, 21 Conn., 1.)

The foregoing cases are by no means all that could be cited, but are amply sufficient to show that the American courts have broken away from the English doctrine, which, as Justice Miller says, "is one which the English chancery court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the states of this Union, as expressed both by their statutes and the decisions of their courts, has not been carried so far in that direction." (Nichols, Assignee, v. Eaton, 91 U. S., 725.)

The conclusion of the United States circuit court of appeals was as follows:

"The purchaser has the right to convey his equitable title or assign his contract to whom he pleased without asking Cheney's consent, and his vendee would succeed to all his rights." (Record, p. 353.)

IX. The United States circuit court of appeals erred in fixing the amount due under the contract. This arises from the refusal of that court to require the payment of interest after the alleged tenders.

The facts relating to the alleged tenders are undisputed. They are as follows: The notes evidencing the annual pay-

ments under the contract were payable at a bank in Tecumseh, Nebraska. As the payments came due, Wisherd, while he claimed the contract, and Bilby during the time he claimed under the alleged assignment to him, would go to the First National Bank of Lincoln, Neb., and upon payment to the bank of one hundred dollars and the expenses of a trip to Tecumseh (distance about fifty miles), the said First National Bank of Lincoln would send one of its employes to Tecumseh with sufficient funds of the bank to pay the installment due that year; the said employe would tender said amount to the bank at which the notes were payable, and demand the surrender of the notes then due. The bank at Tecumseh did not have the notes in its posssession, and the said tender being refused, the employe of the First National Bank of Lincoln would return the money to his bank and it was mixed with the general funds of that bank and again treated in every way as the money of the bank. It is not contended that after 1887 the money was in any way set aside or devoted to keeping good these alleged tenders. The sole expense to the persons claiming under this contract for and by reason of these tenders was one hundred dollars per year, and the expenses of the bank employe in making the trip from Lincoln to Tecumseh, and this expenditure would have been the same had the tenders been accepted. The testimony on this branch of the case is voluminous, and will not be quoted from at this time, as the controversy is not one of fact but of law. Before stating the law question it is necessary to direct attention to another undisputed fact, to-wit, that at all times since the inception of the contract in 1881, Wisherd, the lessee and purchaser under the contract, and his privies, have been in possession of the land in controversy and enjoying the rents and profits thereof. The testimony

shows that such rents and profits, up to the time of taking proof herein, were of the value of not less than $57,000.

Under this condition of fact it is contended, on behalf of the complainant, Bilby, that in order to keep the alleged tenders good, and thereby stop the payment of interest and costs, it is not necessary to set aside a sum of money equal to the amount of the tender and devote it to the special use of maintaining the readiness to make the payment. This view of the law was sustained by the circuit court of appeals. Your petitioner, Cheney, submits that this holding is erroneous, and at variance with the rule established by this court. (Bissell v. Hayward, 96 U. S., 580, 587; Crescent Min. Co. v. Wasatch Co., 151 U. S., 318, 323; Wallace v. McConnell, 13 Pet., 136; State of Illinois v. I. C. R. R. Co., 33 Fed. Rep., 730, 776; Cheney v. Libby, 134 U. S., 68, 84; Peugh v. Davis, 113 U. S., 542, 545.)

Your petitioner contends the rule is that where the purchaser has possession and receives the rents and profits of the estate, then the tender must be kept good by actually setting aside an amount equal to the tender and devoting it to that especial purpose; he must treat the money as belonging to his creditor, and if this is not done then the vendee is chargeable with interest. It is unjust and inequitable that the purchaser should have the rents and the profits, and also the use of the purchase price.

In Bissell v. Hayward, 96 U. S., 580, 587, this court say:

"One of the statements of fact in the case sets forth that Bissell tendered the money; and fails to state that he deposited, or in any manner set it apart or appropriated it for the purpose of the tender. The other states that he used the money he had thus provided. The legal effect is the same. To have the effect of stopping interest and costs, a

tender must be kept good; and ceases to have that effect when the money is used by the debtor for other purposes." (96 U. S., 587, and authorities there cited.)

In Crescent Min. Co. v. Wasatch Co., 151 U. S., 318, this court say:

"It is no hardship that the Crescent Company, which had both the use of the money and the receipt of the issues and profits of the mines, should be charged with interest for the period between the maturity of the mortgage and the payment into court." (151 U. S., 318, 323.)

The federal court for the northern district of Illinois, in the celebrated case known as the "Lake Front Case," speaking by Justice Harlan of the supreme court of the United States, say:

"If the tender of the first installment of $200,000 to the comptroller was binding upon the city, the subsequent return of the money to the railroad companies at their request deprived them of whatever benefit accrued from that tender, leaving them in the attitude of never having performed the conditions upon which they were to acquire title to those lands." (State of Illinois v. Illinois Central R. Co., 33 Fed. Rep., 730–776.)

In Cheney v. Libby, 134 U. S., 68, this court say:

"The payee is not entitled to interest unless it appears that the payor, after the tender, realized interest upon the money."

If the rule were as contended for herein by the appellee Bilby, and as held by the court of appeals, the payee would have the right to devote the money to any purpose he saw fit, so long as he held himself in readiness to borrow or otherwise secure it when needed.

The supreme court of Massachusetts in Sanders v. Bryer, 152 Mass, 141, 143, a recent case, examine and discuss this question with great care and the conclusion reached is announced as follows:

"The question whether a vendee, who has complied with his contract for the purchase of a parcel of real estate in offering to pay the purchase money at the time fixed therefor, is entitled to the rents and profits thereof may arise in two ways—where he is not in possession of the premises, and where, as in the case at bar, he is in possession; but in either case, if he elects to treat the premises, and thus the rents and profits, as his own, it would not seem reasonable that he should treat the purchase money also as his own, deal with it as such, derive a profit therefrom, and still be permitted to deny the claim for interest thereon. Even if he holds himself ready to obtain and pay the money when a conveyance is tendered, if he desires a decree which shall treat the land as his as of the date of the day when he made his offer of payment, the money should be treated as belonging to the vendor as of the same date. The vendee cannot be entitled to the use both of the land and of the money which is the consideration to be paid for it. 'The act of taking possession,' it is said in 2 Sugd., Vend. (8th Am. ed.), 317, 'is an implied agreement to pay interest; for so absurd an agreement as that the purchaser was to receive the rents to which he had no legal title, and the vendor was not to have interest, as he had no legal title to the money, could never be implied.' (Fludyer v. Cocker, 12 Ves., 25.) 'To the rule that the vendee must continue to pay interest, if he receives the rents and profits, there is probably an exception where the money which the vendee is to pay has been set aside and appropriated for the vendor, and he has been notified of this, knows that the money is drawing no interest, and is at his own disposal. But even if a purchaser gave such notice, yet if the money was not actually and *bona fide* appropriated for the purchase, or the purchaser derived the

least advantage from it, or in any manner made use of it, the court would compel him to pay interest.' (Sugd., Vend. (8th Am. ed.), 316; Dyson v. Hornby, 4 De G. & Sm., 481.) In Powell v. Martyr, 8 Ves., 146, it is said by the master of the rolls, Sir William Grant: 'The rule is perfectly clear and perfectly reasonable, that if a purchaser is let into possession and perception of the rents and profits, he shall pay interest for his purchase money;' and in that case it was held that, to excuse a purchaser from paying interest during the delay in clearing difficulties as to the title, it is not sufficient that the money was appropriated and unproductive, but the vendor must have notice of that. The English authorities establish the rule that, even if the vendor is in fault, if the vendee would escape the liability to pay interest he must actually set aside the money and appropriate it for the vendor, must not in any way derive a benefit from it, and must notify the vendor of these facts, and that the money is thus lying idle. (Calcraft v. Roebuck, 1 Ves. Jr., 221; Powell v. Martyr, 8 Ves., 146; Roberts v. Massey, 13 Ves., 561; Dyson v. Hornby, 4 De G. & Sm., 481; Kershaw v. Kershaw, L. R., 9 Eq., 56; Regent's Canal Co. v. Ware, 23 Beav., 575.) This rule is also sustained by many American authorities. (Brockenbrough v. Blythe, 3 Leigh., 619, 638; Selden v. James, 6 Rand., 465; Walker v. Ogden, 1 Dana, 247; Baxter v. Brand, 6 Dana, 296; Rutledge v. Smith, 1 McCord Ch., 399; Hunter v. Bales, 24 Ind., 299; Hundley v. Lyons, 5 Munford, 342; Stevenson v. Maxwell, 3 Comst., 408)" (Sanders v. Bryer, 152 Mass., 141–143.)

The circuit court of appeals say:

"Upon the soundest principles of equity and fair dealing, Cheney is estopped on the facts of this case from claiming interest on the notes after tender of payment." (Record, p. 351.)

The court failed to consider that during all this period

Wisherd or his privies have been in possession of this land. This is a vital point in the contention regarding interest. For this reason the cases cited by the learned court are not in point to sustain the view of the law to which that court acceded.

In Hart v. Brand, 1 A. K. Marshall, 117, 118, the person claiming interest had been in possession and received the rents and profits. In Davis v. Parker, 14 Allen, 94, 101, the same thing is true. The vendor controlled the management of the land and prevented the vendee from realizing any profits thereon.

The case of Cheney v. Libby, 134 U. S., 68, is not in point to sustain the contention that interest cannot be recovered herein. In that case the court say:

"The defendant is not entitled to interest after the respective tenders were made, because it does not appear that the plaintiff has, since the tenders, realized any interest upon the *moneys left by him for Cheney at the bank of Russell & Holmes.*"

An examination of the case will show that the bank of Russell & Holmes was the place of payment fixed in the notes. That Libby deposited the money in said bank for the use and benefit of Cheney and allowed it to remain there. In the case at bar, no money was deposited in the bank where the notes were made payable, and none was deposited anywhere for that matter. Wisherd would borrow the amount of money necessary to pay the principal of the notes from the First National Bank of Lincoln, and immediately return the money to the bank to which it belonged, and would pay the bank one hundred dollars for a three days' loan. This is all that ever took place after 1887.

In the opinion herein the circuit court of appeals say:

"Neither Wisherd nor the complainant realized any interest on the money tendered." (Opinion, p. 352.)

This is true for the very good reason that never for a minute or a day were they entitled to interest. The bank never parted with the possession of the money. The bank always sent the money by the hands of one of its employes, and had it returned the same way. The money was the money of the bank, used by it as such, and being such in fact. This presents a very different question from that of a man taking his own money and depositing it in the bank of payment and leaving it there, as Libby did.

"If it be shown that the party making the tender borrowed the money to be used for that express purpose, and immediately returned it to the lender, this will avoid the tender." (Park v. Wiley, 67 Ala., 310.)

In Peugh v. Davis, 113 U. S., 542, this court say:

"The lots were open, unenclosed, with no buildings on them, and no actual possession or use of them was had by the defendant. His (Davis') possession was merely constructive under his construction of the contract, that the land was his own. The witnesses say it was worth nothing in its actual condition, and no evidence is given to the contrary." (Opinion, p. 544.)

In speaking of the effect of Peugh's willingness to pay, the court further say:

"But he took the money away with him, and used it himself, and there is no hardship in requiring him to pay six per cent interest on it, if he wishes to redeem the lots."

This case does not sustain the view of the law taken by the circuit court of appeals, but is directly opposed to it.

In Roosevelt v. Bull's Head Bank, 45 Barb. (N. Y.), 579, 584, the facts present this question, and the court say:

"There is proof in the case that the defendant, after the tender, put the money into the funds of the bank, and used with other money of the bank in its ordinary business. This I think not in accordance with the ordinary rules as to tender. A party who makes the tender is bound to keep the money at all times ready for payment when demanded, and when sued is bound to bring the money into court. And the theory upon which the tender of the debt stays the interest is, that the debtor is obliged to keep the money ready to pay on demand."

That case is cited with approval by this court in Bissell v. Hayward, 96 U. S., 587.

In Stow v. Russell, 36 Ill., 18, 34, the court say:

"Some portion of the plaintiff's argument on this point would seem to imply that when he had once tendered the money and it was refused, all further responsibility in relation thereto was at an end, and that he had a right to throw it away, or use it for his own purposes. It was his duty to keep the money safely, and produce it when required, to keep his tender good, and especially not to appropriate it to his own use, which he seems to have done."

In Aulger v. Clay, 109 Ill., 487, 492, the court say:

"It is claimed that Clay made a tender when the note matured, and was thereby released from paying any interest on the balance of the purchase money after the tender was made. We will not stop to discuss the question whether there was a sufficient tender, as, if there was, it was not

kept good, so as to stop the accruing of interest. To have that effect the tender must be kept in money, at all times ready to be paid, and subject to the order of the creditor at any time when he shall comply with his contract, so as to be authorized to receive it. * * * It may be that the precise pieces of money need not be kept separate, but the amount must be kept at all times subject to be received by the creditor when he calls for it."

In Thayer v. Meeker, 86 Ill., 470, 474, the court say:

"The debtor escapes payment of interest upon the supposition that the money should be received by the creditor, and that the debtor has set it apart for him, and has been thus deprived of its use and prevented from making profit on it. There is no evidence that this money thus tendered has been so held and not used; and, in the absence of such proof, it was error to decree the payment of the money without including interest." (Murphy v. Gold Tel. Co., 3 N. Y. Supp., 804; Gray v. Angier, 62 Ga., 596; Nantz v. Lober, 1 Duv. (Ky.), 304; Nelson v. Loder, 55 Hun (N. Y.), 173.)

The rule laid down by the American & English Encyclopedia of Law is as follows:

"The tender must be kept good to the time of trial." (Am. Eng. Ency. of Law, vol. 25, p. 922, title "Tender.")

In support of this proposition a large number of cases are cited in note 3, to which this court's attention is directed.

X. The circuit court of appeals saw fit to reject this line of authorities and follow the case of Curtis v. Greenbacks, 24 Vt., 536.

The Vermont court held that if specific articles of personal property are tendered, the articles cannot be retaken, nor disposed of in any way by the one making the tender, but

that where the thing tendered is money, the party making the tender may use it as his own. This doctrine has been expressly denied in the following cases: McPherson v. Wiswell, 16 Neb., 625; Lamb v. Lathrop, 13 Wend., 95; Smith v. Loomis, 7 Conn., 110; Leballister v. Nash, 24 Me., 316; Gilkeson v. Smith, 15 W. Va., 44; Fisk v. Holden, 17 Tex., 408; Kramer v. Stock, 10 Watts (Pa.), 115.

The opinion in the Nebraska case was written by Judge Maxwell, who appears in this case as one of the attorneys for the complainant Bilby, and therein the court say:

"It is evident, however, that the alleged tender was not sufficient and was not made in good faith. While it is true that a tender of property, if properly made, need not be kept good like a tender of money, because such tender vests the title to the property in the creditor, yet there must be an actual tender at the time agreed upon to make it valid. * * * The debtor also must act in good faith. If he applies all the property tendered to a purpose inconsistent with its application to the payment of the debt, the jury will be justified in finding the tender was not made in good faith." (McPherson v. Wiswell, 16 Neb., 630.)

In support of this doctrine the Nebraska court cite, *inter alia*, Curtis v. Greenbacks, 24 Vt., 536.

XI. The circuit court of appeals erred in holding that it was not necessary for the complainant to bring into court the amount of money alleged to have been tendered.

In the case at bar, the party claiming the advantage of the alleged tenders did not deposit the money tendered. In each instance he borrowed the money from a bank and returned it to the bank immediately after each tender, and the bank thereafter used the money as the money of the bank.

It is further admitted that each time the alleged tenders were made, both Wisherd and his assignee Bilby were obliged to *borrow* the money. Under this condition of fact it was necessary for the complainant to bring the money into court. In no other way could his adversary secure the money if he desired to comply with the prayer of the bill.

The circuit court of appeals based its decision on Cheney v. Libby, *supra*, but the circuit court failed to observe that in that case Libby had actually deposited his own money in the bank where the notes were made payable, for Cheney's benefit, and allowed it to remain there at all times, and it was still there when the bill was filed in that case. Nothing of this kind is shown in the case at bar.

"The tender must be pleaded and the plea must be accompanied by the payment of the money into court." (American & English Ency. of Law, vol. 25 (1st ed.), p. 932, title "Tender.")

"The failure to pay it in may be shown, even after verdict." (Claflin v. Hawes, 8 Mass., 261.)

"Where the purchaser has made a tender and demanded a deed, he must renew the tender and pay the money into court, when he brings suit to enforce the sale." (Foster v. Fraser, Montreal L. Rep., 6 Q. B., 405.)

"A failure to pay the money into court, after a tender, will not stop the interest, and will leave defendant still liable for the costs, and will not affect plaintiff's right to recover." (Lewis v. Wilson (Supreme Ct.), 17 N. Y. Supp., 128.)

"Where there is a tender of specific chattels, they need not be brought into court in order to keep the tender alive. It is sufficient that the party making the tender pleads it,

and avers a readiness and willingness at all times to perform. But where the tender is of money, or of things that may be brought into court, defendant must not only plead that he has always been, and still is, ready with the money or things tendered, but it must be brought into court." (2 Kent's Com., 508; 6 Bac., 465; 2 Roll. Abr., 524, 20 Vin., 312*e*; Brooklyn Bank v. DeGrauw, 23 Wend. (N. Y.), 342; 35 Am. Dec., 569.)

The court of appeals apparently refused to allow interest from a misapprehension as to the result which would follow such allowance. That court say:

"It will be perceived, therefore, that the determination of the question whether Cheney was entitled to interest upon notes, payment of which had been duly tendered, involves much more than the sum of that interest. When Cheney abandoned his claim to the first alleged forfeiture and notified Wisherd that he was willing to accept payment of the past-due notes, it was Wisherd's legal duty to pay or tender payment of the same within a reasonable time. He made a tender of the principal of the notes within a reasonable time and renewed that tender at the maturity of the last notes, but in neither instance did he tender interest on the notes after their maturity, claiming that he was not liable therefor by reason of having tendered payment on the notes at their maturity. If he was mistaken in the claim, then he was in default, and by the terms of the contract, Cheney had a right to declare the forfeiture which he did on the sixth of May, 1891, and is entitled to recover, at law, the land and improvements and the whole of the purchase money with interest." (See record, p. 349.)

The apprehension of the court is clearly *non sequitur*. The tenders were necessary to preserve the rights of the vendee under the contract, and may have been amply suffi-

cient for that purpose, and yet by reason of a failure to keep them good, have rendered the vendee liable for the interest.

XII. The circuit court of appeals erred in holding that the contract could be enforced by Bilby as the assignee of Wisherd.

XIII. The circuit court of appeals erred in holding that the conditions of said contract incumbent upon the lessee and vendee had been performed.

XIV. The circuit court of appeals erred in decreeing a specific performance of said contract by requiring Cheney to execute a deed for the land involved.

XV. The circuit court of appeals erred in decreeing the title to said lands to be in Bilby, the alleged assignee of said contract.

The bill herein alleges that Wisherd assigned his contract to the complainant Bilby; but the proof shows that such is not the fact. Wisherd did not assign his contract to Bilby. He executed a quitclaim to the premises on February 13th, 1889. It is contended by your petitioner that on said date Wisherd did not have a title or interest in the land which could be conveyed by quitclaim deed. A quitclaim deed would transfer only the title then vested in the grantor. Any after-acquired title would not pass by such conveyance; and on February 13th, 1889, Wisherd had not completed his contract and could not complete it until May, 1891. Therefore his interest was only an equitable interest which would not pass by a quitclaim deed without the consent of Cheney.

It is the rule that in equity a contract of sale creates a

mutual trusteeship, but the estate is not vested in the vendee until the condition is performed. He has an equitable interest, but it is a limited interest, it is not an entire interest; it is contingent and may never ripen into an entire interest so as to vest him with the whole estate. The principle we desire to present to the court is most clearly expressed in Jennisons v. Leonard, 21 Wallace, 310. It is there said:

"This was a sale of real estate by contract, so common in this country. The legal title remains in the vendor and the possession passes to the vendee. The legal title remains in the vendor, while an equitable interest vests in the vendee *to the extent* of the payments made by him. As his *payments increase his equitable interest increases*, and when the price is paid the entire title is equitably vested in him. * * * The result is quite unlike that of a conveyance, etc. * * * The interest of the vendee is equitable merely, and whatever puts an end to the equitable interest—as notice, or an agreement of the parties, or a surrender, or an abandonment—places the vendor where he was before the contract was made."

This is probably the most carefully considered case to be found where the principles involved are discussed; it is plain and in exact accord with the principles of justice, equity, and law. It makes clear the difference between a contract to sell land and the actual selling. If a contract to sell vests the entire interest in the land in the vendee, it is nothing less than a deed.

The opinion filed herein by the circuit court of appeals plainly states the doctrine that Bilby, having tendered a sufficient sum, is entitled to a conveyance of the land, the same as Wisherd would have been had he fully performed and not sold his claim; that as the entire purchase price had been

tendered, the contract had been completed and restraint upon sale could not longer be insisted upon by Cheney.

But that court seems to have overlooked the fact that the only pretense of assignment was the quitclaim deed of February 13th, 1889, and that the alleged tenders made thereafter, in May, 1889, in May 1890, and in May, 1891, were made by or on behalf of Wisherd.

The necessary and inevitable result is that if the sums tendered were sufficient to complete the equitable title it must be in favor of Wisherd. Such title, therefore, would have been complete on May 5th, 1891, and after being so completed (*which pretense we deny*), there would not exist any valid reason why Wisherd should not sell and convey.

But there are no such facts in this case. The quitclaim deed was made more than two years prior to the limit of time fixed for final payment and the conveyance of the land. It is not in harmony with the established and accepted rules to say that a quitclaim deed will pass an after-acquired title.

At the date of such quitclaim deed, on February 13th, 1889, Wisherd had no title, equitable or legal. The contract did not create an equitable title in Wisherd. It was only a contract that might or might not ripen into an equitable title. This question is fully explained in Chappell v. McKnight, 108 Ill., 570, and again in Walters v. Walters, 132 Ill., 481, where it was said:

"A mere contract to convey at a future time, upon performance by the purchaser, does not create an equitable title. When the purchaser performs all acts necessary to entitle him to a deed, then, and not till then, he has an equitable title and may compel a conveyance."

It must be plain that a quitclaim deed only conveys such

interest as the grantor had at the date of its execution, and after-acquired title will not inure to the benefit of the grantee.

As Wisherd did not have the equitable title on February 13th, 1889, it was impossible for him to convey such title to Bilby. The equitable interest (*if any*) owned by Wisherd on February 13th, 1889, could not be transferred to any person by a quitclaim deed without Cheney's knowledge and consent, as the contract, which was the foundation of any right Wisherd had, forbids such assignments.

XVI. The judgment and decision of the circuit court of appeals herein is in direct conflict with the principle announced by this honorable court, in Arkansas Smelting Co. v. Beldin Co., 127 U. S., 387, where it was said:

"Contracts may be assigned, unless there is a stipulation which manifests the intention of the parties that it shall not be assignable.

"Every one has a right to select and determine with whom he will contract, and cannot have another person *thrust* upon him without his consent."

The above paragraph was quoted and approved in Delaware Co. v. Diebold Safe Co., 133 U. S., 488, and again in Burck v. Taylor, 152 U. S., 634.

But said circuit court of appeals has failed and refused to apply and follow the principle so laid down by your honorable court, and which principle we respectfully insist is peculiarly applicable to the facts of your petitioner's case, and, therefore, the opinion of the circuit court of appeals in this case is antagonistic to the decisions of this court.

XVII. That a decree in this cause was rendered by the

circuit court of the United States for Nebraska, granting the prayer of the bill on May 6th, 1895; that said cause was duly appealed to the United States circuit court of appeals for the eighth circuit July 16th, 1895; that said cause was duly submitted to the said circuit court of appeals on January 22d, 1896; that said circuit court of appeals rendered its opinion in said cause April 13th, 1896, and entered judgment affirming the decree of the lower court; that a petition for rehearing of said cause was filed in said circuit court of appeals on May 1st, 1896; that afterwards said petition for rehearing was by said court denied on May 4th, 1896.

XVIII. A certified copy of the entire record of the said case in said circuit court of appeals is herewith furnished, in conformity with rule 37 of this honorable court, relative to cases from the circuit court of appeals.

XIX. Your petitioner is advised and believes that the said judgment of the said United States circuit court of appeals in the said cause is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination and in conformity with the provisions of section 6 of the act of congress entitled "An act to establish circuit courts of appeals, and to define and regulate, in certain cases, jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the said cause being made final in the said circuit court of appeals by the said act.

XX. And your petitioner has no right of appeal or writ of error in this case for the reason that jurisdiction of the same was originally assumed by the United States court be-

cause of the diversity of the citizenship of the parties plaintiff and defendant.

XXI. Your petitioner respectfully submits that the questions presented by this record should be authoritatively and finally adjudged by this honorable court upon and after a full presentation to the court of the merits thereof. They are questions of gravity and importance not only to your petitioner, but to the business interests throughout the land. This honorable court said in Wallace v. McConnell, 13 Pet., 136:

"It is of the utmost importance that all rules relating to commercial law should be stable and uniform. They are adopted for practical purposes, to regulate the course of commercial transactions."

XXII. Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the eighth circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said case therein, entitled "Prentiss D. Cheney, Appellant, v. John S. Bilby, Appellee, No. 708, December Term, 1895," to the end that the said case may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the prem-

ises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said circuit court of appeals in the said case and every part thereof may be reversed by this honorable court.

And your petitioner will ever pray, etc.

PRENTISS D. CHENEY,
Per CHAS. E. MAGOON,
His Solicitor.

STATE OF NEBRASKA, }
COUNTY OF LANCASTER, } ss.

Chas. E. Magoon, being duly sworn, says he is the solicitor of Prentiss D. Cheney, the petitioner herein and above named, and as such had personal charge for him of the case in the foregoing petition mentioned in the circuit court of the United States for the district of Nebraska and in the circuit court of appeals for the eighth circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

CHAS. E. MAGOON.

Subscribed in my presence and sworn to before me this 12th day of June, 1896.

[SEAL.] FRANK A. BOEHMER,
Notary Public.
Commission expires Dec. 4, 1896.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. .....

To Messrs. Lake, Hamilton & Maxwell, and James W. Hamilton, Attorneys for John S. Bilby:

Please take notice that on Monday, the 12th day of October, 1896, at the opening of the court, or as soon thereafter as counsel can be heard, the petition, of which the foregoing is a copy, will be submitted to the supreme court of the United States for the decision of the said court thereon.

PRENTISS D. CHENEY,
Per CHAS. E. MAGOON,
His Solicitor.

Service of a copy of the within notice and also of the petition for writ of certiorari received this ..... day of ....., 1896.

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.....

.....

STATE OF NEBRASKA, }
COUNTY OF DOUGLAS, } ss.

Chas. E. Magoon, being first duly sworn on oath, says that on June 13th, 1896, he served the notice and also the petition for writ of certiorari on the appellee, John S. Bilby, by delivering a duplicate and true copy of the foregoing petition for writ of certiorari and notice of the time when said

petition would be presented to the court, to and leaving the same with John W. Hamilton, attorney at law, and a member of the firm of Lake, Hamilton & Maxwell, at the office of said firm in Omaha, Nebraska, said John W. Hamilton being the same person who appeared as solicitor and counsel for said appellee Bilby in this action in the United States circuit court of appeals for the eighth circuit, when the action was there pending. CHAS. E. MAGOON.

Subscribed in my presence and sworn to before me this 13th day of June, 1896.

[SEAL.] FRANCIS J. MIEDING,
Notary Public.
Commission expires April 23, 1901.

164-705

SEP 17 1896
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 961.

PRENTISS D. CHENEY,

Appellant,

v.

JOHN S. BILBY,

Appellee,

PETITION FOR WRIT OF CERTIORARI.

BRIEF IN SUPPORT OF PETITION.

CHAS. E. MAGOON,
Solicitor for Petitioner.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

PRENTISS D. CHENEY, *Appellant*,
v.
JOHN S. BILBY, *Appellee*.

No. .....
PETITION FOR WRIT OF CERTIORARI.

BRIEF IN SUPPORT OF PETITION.

May it Please the Court:

Our objections to the decree in this case are set forth in the petition for a writ of certiorari; the principal question presented is: Did the circuit court of appeals err in affirming the order of the circuit court granting the prayer of Bilby, a stranger, alleged to be an assignee of a contract to convey land, executed by Cheney as vendor to one Wisherd as purchaser, said contract containing a stipulation forbidding assignment without the consent of Cheney, the vendor? As no such consent was given nor claimed, we contend that the court of appeals ignored the decisions of this court by recognizing Bilby as a party entitled to relief. The rule established in Arkansas Smelting Co. v. Belden Co., 127 U. S., 387, Delaware County v. Diebold Safe & Lock Co., 133 U. S., 417, 488, and Burck v. Taylor, 152 U. S., 634, 649, which rule is followed in Meyer v. Ward, 87 Texas, 622, assures the correctness of the petitioner's claim. These cases are quoted from in the application and further reference is unnecessary.

The stipulation prohibiting assignment is in these words:

"No modification or change of this contract can be made except by entry hereon signed by both parties. * * * And it is further stipulated that no assignment of the premises, or of this contract, shall be valid unless with the written consent of the first party, and by endorsement of the assignment hereon."

It was impossible for Bilby to become a party to the contract except by a novation, which would discharge Wisherd and substitute Bilby as the party to fulfill the obligation originally assumed by Wisherd. The manner in which a novation could be accomplished was fixed by a stipulation in the contract, which, when complied with, would have fulfilled the indispensable requirements of assent, or the meeting of minds and the mutuality of obligation and equitable remedy. It was in every respect as necessary that mutual assent and mutuality of obligation should exist between Cheney and Bilby as between Cheney and Wisherd. Without the presence of these vital requisites no contract whatever could be formed between Cheney and Bilby.

Bilby attempts to override the contract, and claims to be a party thereto, without complying with the specified terms and in defiance of the prohibition against assignment.

"The right to a specific execution of a contract, so far as mutuality is concerned, depends upon whether the agreement itself is obligatory upon both parties. A party not bound by the agreement itself has no right to call upon a court to enforce performance against the other party by expressing a willingness to perform on his part." (Duvall v. Myers, 2 Md. Ch., 401.)

The right of a party to equitable remedy depends upon the fact that the agreement was originally binding upon him, and not upon his subsequent willingness *or offer* to be bound and to perform the contract on his part. (Bodine v. Glading, 21 Pa. St., 50.)

In Kleinhaus v. Jones, 68 Fed. Rep., 749, the court say:

"It must appear that a binding legal contract exists between the parties. The minds of the parties must have met and agreed to the terms of their agreement. In order that there shall be any bond which shall tie the parties in mutual obligations, their assent must be communicated to each other. Where one party has not consented to the several terms to which the other has agreed, no contract is formed. The court will not speculate upon the question whether some stipulation which it might think of minor importance, or some variation which it might think did not influence the parties in making the contract, can be dispensed with and the parties held in disregard of them." Citing Bank v. Hall, 101 U. S., 50; Nickerson v. Nickerson, 127 U. S., 668; De Sollar v. Hanscombe, 158 U. S., 216, and many other cases in the United States supreme court.

This decision was rendered by the United States circuit court of appeals for the sixth circuit, June 10th, 1895.

An inspection of the two duplicates of the contract, one introduced by the complainant, the other by the respondent, demonstrates that no assignment to Bilby was ever made.

In discussing this branch of the case the circuit court of appeals say:

"The views which we have thus expressed on this branch of the case are the same in substance that we find stated in a little different form in the case of Wagner v. Cheney, 16 Neb., 202."

The best comment on the case cited is that contained in Cheney v. Wagner, 33 Neb., 310. The court upon having the case presented to it a second time say:

"Wagner did, as far as he was able to do so, defeat the right of Cheney to the consideration for the land. He has conclusively shown that he does not desire to do equity, and were this a trial court the former decree would be vacated and the action dismissed. Wagner has shown such a want of good faith as to justify denying him any relief." (33 Neb., 310, 313.)

Evidently the court of appeals overlooked the fact that the decree which is approved was obtained by fraud, and merited and received the condemnation of the court which rendered it. We are clearly justified in objecting to the use of this fraudulent decree to show inequitable conduct on the part of Cheney, or to deprive him of the benefits of his contract herein.

The circuit court of appeals say:

"If Cheney intended to take advantage of the alleged breach of this provision of the contract, he should have made the fact known when the final payment for the land was tendered by the complainant. The evidence shows, however, that he did not decline to accept the final payment when the same was tendered, on the ground that the contract had been wrongfully assigned, and that he was under no obligation to accept payment from an assignee thereof."

The court overlooked the fact that it was not claimed in the bill or at the hearing that Cheney knew of this assignment at the date of the final payment. Upon this point Cheney testifies as follows:

Q. You may state what, if any, knowledge you possessed, or what, if any, information you had received prior to the commencement of this suit relative to the alleged transfer of the contract, evidenced by Exhibit A, to John S. Bilby, the complainant herein.

A. I never knew of any transfer from John A. Wisherd to John S. Bilby until I commenced the ejectment suit against John A. Wisherd to recover possession of this same land. (Pages 238, 239.)

This evidence is uncontradicted.

"A waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it." (Livesey v. Omaha Hotel Co., 5 Neb., 69; Bigelow on Estoppel, p. 476, ch. 18.)

The existence of a waiver is not suggested in the bill or attempted to be established by the proof.

If it shall apppear to this court that Bilby was without the right to make himself a party to this contract and call for its specific performance, such conclusion will necessarily end the whole controversy; but if this court shall say that Bilby has a standing as assignee, then we ask attention to the facts shown in the record, which conclusively show that there was complete failure in performance of the essential and material provisions of said contract.

The contract involved was made May 2d, 1881. It provided for the leasing and sale upon condition of two thousand two hundred and fifteen acres of land, for the sum of fifteen thousand dollars, with interest at ten per cent per annum. The principal sum was divided into eight annual payments, due May 2d—5th of each year, commencing with the year 1884. The interest was payable annually. Wisherd entered into possession of the premises immediately by placing thereon his tenants, and has remained in possession in the same way ever since, taking the benefit of the rents and profits thereof. When the first principal payment came due in 1884, Cheney had the notes at the place of payment on the last day of grace, May 5th, 1884. No person or money was there to meet the payment. From that time to this not a dollar has been paid to Cheney, either on said contract or for the rents and profits of said estate.

The circumstances surrounding this default in payment are worthy of consideration, as explaining subsequent action, although nothing is claimed by reason thereof in this action, excepting as it affects the question of interest. At this time, May 5th, 1884, a panic was abroad in the land. Cheney needed the money due him to protect other interests, which the panic endangered. Sharing the universal feeling of apprehension towards small western banks at that time prevalent in the east, he sent the notes to the bank of payment by his brother. Wisherd had been in possession and realizing the rents and profits of the estate

for three years. His default was a serious blow to Cheney, who upon learning of the default declared a forfeiture of the contract, returned the notes to Wisherd, and brought suit in ejectment to recover possession. Without discussing the merits of that forfeiture, admitting if necessary for the purposes of this argument that the suit was ill-advised, we pass to the year 1890. The ejectment action had been dismissed by Cheney in this court. On the 17th of May, 1890, Cheney undertook to secure the money due him as back payments on this contract. He left his home in Jerseyville, Illinois, and brought with him all the notes then due. He placed them in the banking house of Russell & Holmes, at Tecumseh, Nebraska, and left them there with instructions to receive payment of the face value and accrued interest to that date. (See deposition of Cheney, pages 233, 234; also Exhibit I to Cheney's deposition, page 270.) He on the same day notified Wisherd of his action, and that said notes would be at the bank of Russell & Holmes and that Wisherd might pay the same within a reasonable time. (See deposition of Cheney, page 234, and Exhibit J, page 271.) Pursuant to this notice, Oscar Callihan appeared at said bank on the 29th day of May and tendered on behalf of Wisherd the sum of $17,512, conditioned upon the surrender of the notes then due. This amount was simply the face value of the notes, without adding interest, and the tender was refused. Unless tenders had been previously made and kept good,—that is to say, unless the money had been actually appropriated and set aside for the purpose of paying the same to Cheney at any time when he saw fit to receive it, and deposited in some place where he could go and get it, and notice thereof given him,—then interest should be paid him. It is conceded that the tenders were not kept good in the manner indicated, the appellee contending that where the tender is of money such action is unnecessary. After allowing the notes to remain at the bank of Russell & Holmes for about thirty days, they were

returned to Cheney. On the 5th day of May, 1891, the final payment under said contract became due. On that day Cheney personally presented the notes at the Tecumseh National Bank, the successor of the Bank of Russell & Holmes, and had with him a duly executed warranty deed, with general covenants executed by himself and wife to John A. Wisherd, and found that no money was there to make the payments and that no person was there to take up the notes. (See page 235.) He was informed by the bank that the cashier of the First National Bank of Lincoln had been there on the 2d day of May with the sum of $19,512 with which to pay these notes, and that said money was on deposit in the First National Bank of Lincoln. This was simply the total of the face value of said notes, no interest being offered or allowed. He continued his journey to Lincoln and presented himself at the First National Bank, prepared to complete the contract and to convey the land to Wisherd. (See pages 235 *et seq.*; Exhibit L, page 272.) Up to this time all the tenders had been made in the name of Wisherd, and Bilby had not asserted a claim of interest in the contract. The coming of Mr. Cheney to Lincoln was made known by the Tecumseh National Bank to the First National Bank of Lincoln in a telegram, which was as follows:

"TECUMSEH, NEB., May 5, 1891.

"*To J. D. Macfarland:* Cheney says he will see you tomorrow about Wisherd matter. C. A. HOLMES."

Upon receiving this information Mr. Macfarland, the president of the bank, telegraphed to George B. Lake, the attorney for Wisherd and Bilby in this matter, as follows:

"LINCOLN, May 5, 1891.

"*Hon. George B. Lake, Omaha:* See my letter of yesterday. Cheney is now at Tecumseh. Wisherd note was due May 2. This is the last day of grace. Do you advise making tender again? J. D. MACFARLAND."

To which he received the following answer:

"OMAHA, NEB., May 5, 1891.

"*J. D. Macfarland:* To your question my answer is No.

"GEORGE B. LAKE."

Cheney was then upon the ground. That day was the day of final payment. He was there prepared to complete the contract. It was the day when under the law the tender should be made, and the bank upon asking if it should tender him the money is instructed not to do so. (See Exhibits A and B, 3 and 4, attached to the deposition of J. D. Macfarland, pages 89, 90.) This was an abandonment of the contract. Upon this subject Mr. Macfarland testified as follows:

Q. Was any tender made to Mr. Cheney when he was in the bank during his call in May, 1891?

A. No, sir. There was no tender made. (Macfarland's deposition, page 87.)

Upon inquiry Cheney found that the First National Bank of Lincoln held a draft for $19,512, drawn by one J. S. Bilby on himself, payable to the order of Oscar Callihan, at the private bank of J. S. & J. E. Bilby & Co., doing business in the village of Quitman, Missouri, on a capital of $25,000. This draft had not been endorsed by the payee nor cashed by the bank, in which condition it has ever since remained. This was the first time Bilby's name had appeared in this transaction, and it was not until eighteen months thereafter that he made any claim to Cheney of an interest in the land or contract.

It is contended by Cheney that he is entitled to interest on the deferred payments due each year from 1884 to 1891. If his contention is correct, there was due him on May 5th, 1891, the sum of $26,353.80, and upon refusal to pay this sum the contract would be adjudged abandoned. It is conceded that the party claiming the specific performance of the contract refuses, and has at all times refused, to pay

the interest on deferred payments after maturity. This refusal is made on the averment that tender of payment was proffered when the several sums became due, and upon refusal to accept, the said tenders were "kept good." While your petitioner contends that the alleged tenders were without effect, it is only necessary in this argument to discuss the question of keeping good these tenders. There is no controversy as regards the facts. The issue turns upon a question of law.

Bilby contends that a tender of money need not be kept good by setting aside and devoting the money to that especial purpose. This view was sustained by the court of appeals upon authority of Curtis v. Greenbanks, 24 Vt., 536, 540.

Cheney contends that where a person is in possession of purchased property, realizing the rents and profits thereof and devoting them to his own use, he should be required to keep good the tender of the purchase price by setting it aside and treating the money not as his own, but as that of his creditor. The purchaser is not entitled to the use of both the property and the purchase money. This is the rule of this court. (Bissell v. Hayward, 96 U. S., 580, 587; Crescent Min. Co. v. Wasatch Co., 151 U. S., 318, 323; Wallace v. McConnell, 13 Pet., 136; Cheney v. Libby, 134 U. S., 68, 84; Peugh v. Davis, 113 U. S., 542, 545.)

TESTIMONY REGARDING DISPOSITION OF MONEY USED IN MAKING TENDERS.

The evidence shows that Wisherd arranged with the First National Bank of Lincoln, Nebraska, to make these tenders. In so doing the bank, on the days of payment, would send one of its employes to Tecumseh, Nebraska, a distance of about fifty miles. The employe sometimes took a sufficient amount of the money of the bank to make the tender, and sometimes secured it for that purpose of the bank in Tecumseh. He would then go to the bank where

the notes were made payable and make proffer of payment upon compliance with the demand for the surrender of the notes. Up to 1887 the notes were in the possession of Wisherd. Then the bank employe would return the money to the bank in Tecumseh if secured there, and if not, would bring it back to Lincoln. The money used for the tenders in 1885 and 1886 was placed in the gold reserve of said bank and reported to the government as gold reserve. (Pages 100, 101.) The aggregate tendered for 1885 and 1886 was $8,351. On December 22, 1886, this amount was reduced to $5,785. No reason is given for this reduction. On January 30th, 1887, the entire amount was taken from the gold reserve and mingled with the other funds of the bank. (Page 101; also page 60.) On April 26th, 1887, Wisherd, in order to arrange for the tender of the money due May 5th, 1887, entered into the following agreement with said First National Bank:

"LINCOLN, NEBRASKA, April 26, 1887.

"It is understood with John A. Wisherd that while his suit is pending in court we will endeavor to make him loans from time to time as his payments become due with P. D. Cheney under the contract herewith, in order to tender the money, for his benefit, and if the money is not used longer than three days at a time he is to pay us the sum of one hundred dollars per annum from this date, and expenses, for our commission. If the money is used longer than three days at a time he is to pay interest on same at the rate of ten per cent per annum from the time it is used.

"JOHN A. WISHERD.
"JOHN R. CLARK, *Cr.*"

The "suit pending in court" was the ejectment case instituted in 1884 and dismissed in 1889. It was entirely separate and distinct from the suit now pending.

Attached to this agreement is the contract involved herein, and to that contract is attached the following assignment:

"LINCOLN, NEB., April 27, 1887.

"In consideration of the receipt of one dollar, and other

valuable considerations, I hereby assign, set over, and transfer to the First National Bank of Lincoln, Nebraska, all my right, title, and interest in and to the accompanying contract, as collateral security for the payment of my obligations to the said First National Bank for any moneys that may hereafter be received by me from said bank, or advanced by said bank on this contract.

"JOHN A. WISHERD.

"In presence of
"JOHN R. CLARK.

"This assignment to be removed if contract is taken into court. CLARK."

(See Exhibits H and I, attached to Lippincott's deposition, pages 75, 76.)

The testimony of all the bank officials, J. D. Macfarland, president, Oscar Callihan, cashier, R. D. Miller, assistant cashier, C. S. Lippincott, assistant cashier, all establish the fact that after this contract was entered into there was no pretense of setting aside any money for the purpose of keeping these alleged tenders good. From April 26th, 1887, to the present time there has never been one dollar set aside or placed to the credit of any person in the First National Bank of Lincoln, Nebraska, for the purpose of keeping these tenders good. This is shown by the evidence of every person connected with the bank who has any knowledge of this matter. (See cross-examination of Lippincott, pages 59 to 71; John D. Macfarland, pages 81 to 89; R. D. Miller, pages 99 to 101; Oscar Callihan, pages 110 to 113.) The only thing on which the complainant has to rely as to keeping these tenders good was the contract with the First National Bank of Lincoln, hereinbefore set out. An examination of this contract shows that it is far from serving such a purpose. Its provisions are as follows: "It is understood with John A. Wisherd that while his suit is pending in court we will *endeavor to make him loans* from time to time as his payments become due P. D. Cheney under the contract herewith, *in order to tender the money for his benefit.*"

It is only by reference to the letter-head of the paper on which this understanding is recorded that it can be inferred that this was a contract with the First National Bank. The memorandum is very carefully drawn so as not to bind the person who signed it or the bank. The language used is, "It is understood," not, it is hereby contracted and agreed. The "understanding" was that "we will endeavor to make him loans from time to time," and these loans, if the endeavor were successful, were to be made "in order to tender the money for his benefit," not to pay the money for Cheney's benefit, and this understanding was only to continue "while his suit is pending in court." The suit referred to was the ejectment suit tried in 1887, and when that suit was terminated by a dismissal in the supreme court of the United States, the understanding was then at an end. This understanding was not a contract which Cheney could enforce had he undertaken to do so. It does not pretend that the tenders are to be kept good at this bank, nor that the money is to be used more than three days. In no instance was the bank, while acting under this contract, paid for more than a three days' loan. (Page 173.) Therefore both Wisherd and Bilby knew the tenders were not being kept good. Of this contract Oscar Callihan, the cashier of said bank, testifies as follows:

Q. What do you know as to whether there had been an arrangement made, prior to the time that you made this tender, that these tenders should be kept good at your bank; that is, that the bank should at all times be ready to pay these notes if called upon to do so; that is, to the amount of the tenders that had been made?

A. I do not understand that such a contract existed.

Q. I ask you if you had any knowledge in relation to it, whether there was or not?

A. If there was such a contract I do not know of its existence. I might say that a contract was made provided that the First National Bank should pay each year, or offer to pay—should make this tender; but if any contract existed to hold that tender good all the year round, I have

forgotten it, if I ever knew of its existence. (See deposition of Oscar Callihan, cashier of the First National Bank, page 110.)

On cross-examination this witness further testifies:

Q. During that time was there any money on deposit, or held in trust, or as a special deposit, by the First National Bank of Lincoln, with which to pay any notes given by John A. Wisherd to P. D. Cheney?

A. Not as a deposit. There was no money on deposit for that purpose, other than in this way. We had authority by letter to draw on Mr. Bilby for the amount necessary to pay these notes or make these tenders.

Q. That authority was to be exercised in the event the alleged tender was accepted, was it not?

A. Yes, sir.

Q. And until the acceptance of the money alleged to have been tendered you had no authority to make a draft or draw these funds of Mr. Bilby?

A. No, we had not.

Q. Was there any money deposited during the period mentioned in the First National Bank of Lincoln with which to keep these tenders, or any tender, good, either as a special deposit or in the general account or as a trust fund, for or on behalf of John A. Wisherd or John S. Bilby?

A. No, sir.

Q. You have stated that at the time these alleged tenders were made the bank was ready to pay the money. For how long after these alleged tenders were made did the bank stand ready to pay the money?

A. I think that after the tender was made and refused, if a notice had been sent of its refusal to Mr. Bilby and Mr. Wisherd, that we would not have been warranted in paying it without communicating with them if the notes were presented afterwards.

In speaking of the tenders made by the bank the witness testifies as follows:

Q. Then it simply was this: Mr. Wisherd would borrow the money from the bank for the length of time necessary to make the tender, and return it to the bank after the tender was refused?

A. That would be the nature of the transaction. It would simply be a three days' loan to Mr. Wisherd, with a guarantee from Mr. Bilby to pay it back at the end of the three days if Mr. Wisherd did not pay it. As near as I can get at it, that would be the nature of the transaction, except as to the year 1891. Then a certified draft or check was sent to us, which we could have sent in and collected before we made the tender, if we desired. (See Callihan's deposition, pages 111, 112.)

"If it be shown that the party making the tender borrowed the money to be used for that express purpose, and immediately returned it to the lender, this will avoid the tender." Park v. Wiley, 67 Ala., 310.)

It ought not to be held that a tender was kept good when the fact is that the person to whom the money is due and owing is unable to get it. The contention of the complainant is that the tenders alleged to have been made were kept good in the First National Bank of Lincoln, Nebraska. The president of that bank, John D. Macfarland, testifies as follows:

Q. Did you have any money or funds of John A. Wisherd or John S. Bilby in the First National Bank at any time during your presidency excepting as represented by this draft?

A. We did not.

Q. Did you have any money deposited there with which to keep this tender or these tenders good, either as a special deposit or in the general account, for or on behalf of John A. Wisherd or John S. Bilby, excepting this draft?

A. We did not, sir, during my connection with the bank.

Q. The only funds that were ever placed at your disposal in this matter was this draft?

A. That was all.

Q. Would this bank at this time advance $19,512 on this draft?

A. I am not an officer of the bank now and cannot speak for it, but I should say that no bank would pay out money on a draft as old as this one is.

Q. When did your connection with the First National Bank cease?

A. The first of June, 1892.

Q. Would you as the president of that bank, at any time during the year 1892, have advanced the money upon this draft?

A. No, sir.

Q. Would you have allowed the bank to advance $19,512, or any part thereof, on the faith and credit of this draft during the year 1892?

A. No, sir; I should have insisted upon a new draft being furnished, or money in some other shape, because it had passed the time when it could probably be collected legally. (Macfarland's deposition, page 82.)

President Macfarland further testifies:

My recollection is that Mr. Callihan, or possibly Mr. Miller, who was the teller in the bank, brought my attention to the matter and explained what had been done in previous years, and that it was necessary to make another tender, and I, as I now recollect the facts, wrote, or Mr. Callihan wrote, to Mr. Wisherd and told him this final tender was to be made; that it was a large sum of money and we wanted him to provide the funds and have them here at the time the tender was to be made.

Q. The bank was not willing to advance the money?

A. Yes, sir; I told him in my opinion it would be necessary to make a tender of the full amount due, and that was more money than we would care to advance in one sum.

Q. And he would have to make additional arrangements with you to make that tender?

A. I told him he would have to have the funds here to make it with. (See page 84 of Macfarland's deposition.)

On cross-examination, this witness further testifies as follows:

Q. If, during the term you were president of the First National Bank in the year 1892, the Wisherd notes had been presented at this bank for payment, would you have allowed said bank to pay the said notes without additional arrangements being made with Mr. Bilby and Mr. Wisherd additional to what was in the bank at that time?

A. I would not in 1892.

Q. After what time in the year 1891 would the bank have refused to pay these notes upon the strength of the arrange-

ments made, up to and including the time of receiving, by the bank, of the draft sent by Mr. Bilby for $19,512?

A. We would not have paid out the money after the injunction was served on us, which, as I remember, was about the 7th day of May. And in the absence of that injunction would not have paid it out after the time when Mr. Cheney was here personally. (Deposition of Macfarland, page 88.)

Upon the fact as to whether or not the money tendered at the bank of Russell & Holmes was set aside for the purpose of keeping the alleged tender good, President Macfarland testifies as follows:

Q. What was done with the money that Mr. Callihan took to Tecumseh in May, 1891, to make the alleged tender, on his return from Tecumseh with it?

A. Well, I don't recollect now how much of it he brought back, but what he did was put into the general cash of the bank—whatever he brought back.

Q. It was taken from that fund and put back in that fund?

A. Yes, sir.

Q. And used as the moneys of the bank from that time on?

A. Yes, sir.

Q. Was any tender made to Mr. Cheney when he was in the bank during his call in May, 1891?

A. No, sir, there was no tender made. (See pages 87 and 88.)

Under the testimony offered it may well be doubted that the bank would have parted with the funds tendered if acceptance of the same had been made, but certain it is that the bank did not stand ready to pay out this money at all times after the 26th of April, 1887.

Upon this question C. S. Lippincott, the teller of said bank during that period, testified as follows:

"I desire to make an explanation, or an additional statement, regarding one of my answers there. As I understood it, the bank was ready to pay this money up to January 30th —or January 29th, 1887, the 30th being Sunday—at any time the demand was made upon it for the money. That is

the way I wanted to put that answer. It was ready *at the dates on which the tender was made each year*, to pay the money." (See page 58.)

Upon cross-examination he testifies as follows:

Q. Regarding your testimony relative to the ability and willingness of the bank to pay the amount of these alleged tenders, is not the fact that your testimony is intended to show that the bank was financially able, and was willing to carry out the agreement which it had entered into with Mr. Wisherd, to advance for Mr. Wisherd to such person or persons as Mr. Wisherd indicated the amounts represented by these alleged tenders?

A. Yes, that is true. You want to limit the time?

Q. Up to the 29th day of January, 1887?

A. Yes, sir.

Q. That is all you wish to be understood as testifying to?

A. Yes, sir. (See Lippincott's testimony, page 61.)

This witness further testifies regarding the draft sent by Bilby to the bank to make tender in 1891:

Q. If called upon to do so, would the bank cash this draft at this time?

A. No, sir.

Q. Would it have done so at any time in the year 1894?

A. No, sir.

Q. Would it have done so at any time in the year 1893?

A. I think not.

Q. Would it have done so at any time in the year 1892?

A. I think not.

Q. Would it have done so at any time after the 2d day of June, 1891?

A. I am not prepared to answer that question.

Q. Would it have done so at any time late in the year 1891?

A. As to that I am not prepared to testify.

Q. Did you ever cash this draft?

A. No, sir.

Q. Did the person to whose order this draft was drawn ever endorse it?

A. No, sir.

Q. Would it have been paid without his endorsement?

A. I presume not.

Q. Would the First National Bank of Lincoln, Nebraska, have advanced any money on this draft without the endorsement of the person to whose order it was drawn?

A. No, sir. (See page 70.)

"Tender means not only once ready to pay, but always since and still is." (Parsons on Contracts, vol. 2, sec. 646, page 76, 8th ed.; Dickson v. Clark, 5 C. B., 365; Cotton v. Goodwin, 7 M. & W., 147.)

The facts herein fail to establish that the alleged tenders were kept good.

Two recent cases upon the proposition that tender must be kept good in order to stop interest and costs are the following: McCauley v. Leavitt, 37 Pac. Rep., 164; Burlock v. Cross, 26 Pac. Rep., 142.

In McCauley v. Leavitt the court say:

"The place of payment was a matter of arrangement between the makers and payee for their mutual accommodation. The payee did not agree to have the note at the bank on the date of maturity, but simply that it should be payable there. Hence the mere failure to present it for payment there on the date of maturity did not exonerate the makers from their promise to pay according to the terms of the note. Nor would it prevent the payee from recovering his interest and costs, in the absence of a readiness on the part of the makers, at the time and place appointed, to pay the note. If on or before the day of maturity the makers would have deposited the money with the bank for the payment of the note in full on presentation, or if, on the day of maturity, they had called at the bank, and made a valid tender of the money, and demanded the note, then such deposit or tender, if it had been kept good, would have prevented the payee from recovering interest after maturity, as well as costs of suit. There being no such deposit or tender, and no valid tender after maturity, the payee was entitled to recover, in accordance with the terms of the contract, the amount due on the note at the time of suit. (Story, Prom. Notes, sec. 228; Hills v. Place, 48 N. Y., 520; Wallace v. McConnell, 13 Pet., 136; Washington v. Bank, 1 How. (Miss.), 230.)" (37 Pac. Rep., 164.)

The language used by the court in this case as above quoted is taken verbatim from the language of the supreme court of the United States in Wallace v. McConnell, 13 Pet., 136.

In Burlock v. Cross the court say:

"The obligaton to keep the tender good is as essential to the legal efficacy of the tender as the offer of the money itself." (26 Pac. Rep., 142.)

THE EFFECT OF NOT KEEPING THE TENDER GOOD.

The effect of not keeping the tender good is to subject the person making the tender to payment of interest on the amount due, and in the event of suit, to the payment of costs. (Bissell v. Hayward, 96 U. S., 580, 587; Crescent Min. Co. v. Wasatch Co., 151 U. S., 318, 323; Wallace v. McConnell, 13 Pet., 136; State of Illinois v. I. C. R. R. Co., 33 Fed. Rep., 730, 776; Cheney v. Libby, 134 U. S., 68, 84; Peugh v. Davis, 113 U. S., 542, 545; Sanders v. Bryer, 152 Mass., 141, 143; Roosevelt v. Bull's Head Bank, 45 Barb. (N. Y.), 579, 584; Stow v. Russell, 36 Ill., 18, 34; Aulger v. Clay, 109 Ill., 487, 492; Thayer v. Meeker, 86 Ill., 470, 474.) These cases having been quoted from in the petition for the writ, pages 11 to 18, will not be further discussed. In addition to the foregoing cases, the following are also cited as determining the question: McCauley v. Leavitt, 37 Pac. Rep., 164; Burlock v. Cross, 26 Pac. Rep., 142; Werner v. Tuch, 127 N. Y., 217; Peoples' Sav. Bank v. Norwalk, 56 Conn., 547; Morrison v. Jacoby, 13 West. (Ind.), 390.

When Cheney sent the notes to the place of performance in 1890 and expressed his willingness to stop further controversy, and notified Wisherd of his desire for payment, Wisherd, or one claiming under him, should have paid the notes and interest. This was refused. Again in 1891, at the time the contract matured and should have been completed, Cheney was at the place of payment ready and willing to perform the contract and to deed the land to

Wisherd upon payment of the notes and interest. Again, Wisherd, or those claiming his interest, refused payment of the sum due. For a year Cheney stood ready to perform his contract, asking only that his tenant, who had the use and benefit of the property, and had not kept his alleged tender good either with his own or borrowed money, should pay him the interest which the contract called for, and which Wisherd would have paid the bank had the money borrowed not been returned.

The necessary result of these failures and refusals is that the contract became abandoned. Cheney could then do only one thing, declare a forfeiture and bring suit for possession, which he did in May, 1891. On December 2d, 1892, Bilby for the first time asserts a claim of title, which he does by filing the bill herein, seeking to compel specific performance of a contract to which he was a stranger, and compliance with which he refuses. Under these conditions it would seem clear that he is not entitled to the relief prayed. Under the facts shown, if this case is to be tested by the ethics of the gaming table, the expression found in the opinion of the circuit court of appeals, "he put the interest on the money tendered to the hazard. He chanced it and lost," seems best applied to the appellee Bilby.

There is throughout the opinion of the circuit court of appeals manifest criticism and censure of Cheney, which, although keenly felt, would not be referred to were it not for the fear that silence might be construed into indifference. The court in the opinion felt constrained to rebuke the stringent provisions of the contract involved herein. However far they may exceed the judicial experience of that court, the fact remains that although involved in numerous cases cited by the court in its opinion, in not one has the purchaser suffered, and in every instance Cheney has been the losing party. While it is a time-honored rule that the powers of courts are intended to enforce contracts, not to make them, yet, were this rule abandoned, the result of previous litigation demonstrates that the wording of the

contract involved could not be improved to benefit the purchaser, and must be changed if Cheney is to derive advantage therefrom. This honorable court in speaking of a similar contract say:

"However harsh or exacting its terms may be, as to the appellee, they do not contravene public policy; and, therefore, a refusal of the court to give effect to them, according to the real intention of the parties, is to make a contract for them which they have not chosen to make for themselves." (Cheney v. Libby, 134 U. S., 68, 78.)

The legality of this contract is therefore beyond question. Furthermore, this is an action instituted by the appellee to compel the specific performance of this contract. To do so the court should enforce all the requirements thereof, and a litigant cannot be heard to object to the provisions of a contract which he prays the court to specifically enforce. The fact is the contract is one which was in common use in the west prior to 1880. The full force of criticism of this contract is that it fully, explicitly, and repeatedly sets forth and calls attention to the liabilities to which the purchaser subjects himself. "The head and front of my offending hath this extent, no more."

The learned circuit court of appeals felt impelled to direct attention to the fact that the appellant has appeared as a party in a number of cases before the courts, which cases are cited in the opinion. An examination of the citations will disclose that in those cases, as in this, the appellant was the defendant, and his appearance in court was rendered necessary by the process thereof. But if this were not the fact, it is at least surprising to find a court of exalted station criticising, directly or by implication, a man who is willing or anxious to submit his rights to the arbitrament of legal tribunals. In these days it behooves courts, at least, to commend rather than condemn a citizen who, believing that his rights have been infringed, submits the question to the courts of his country.

The cases to which appellant was a party, cited by the court of appeals in its opinion, were tried many years ago. The question involved in each was whether the court would relieve a party to a contract from the effect of a default in the payment of money, and if so, under what circumstances? At the times these cases were instituted the question was an open one in this country. That appellant has seen fit to assist in determining this question, and subject himself to the payment of the costs therefor, ought not to prejudice him when he presents another question. I hasten to disclaim a belief that it has or will work such prejudice. But counsel for the appellee urged upon the circuit court of appeals that it should, and the cases cited by counsel for that purpose are the first cases referred to in the opinion of the court, and the court seems to have overlooked the well-known rule that "No man is to be esteemed a wrong-doer who avails himself of his legal right."

In criticising Cheney's conduct herein, the circuit court of appeals say:

"Cheney's conduct and attitude multiplied the already heavy burdens of an unconscionable contract. His declaration that the contract was forfeited, his denial of Wisherd's right to the land, and his bringing the suit to recover it, necessarily impaired Wisherd's credit and made it more difficult and burdensome for him to raise the money to pay or tender payment of the notes as they matured. It is a maxim that a man must be held to have contemplated the necessary results of his action. Cheney must have known how embarrassing and burdensome his action was to Wisherd. He evidently hoped it would utterly destroy his credit and put it out of his power to raise money to pay or tender payment of the purchase money notes as they matured."

It is respectfully submitted that this complaint appears for the first time in the record of this case in the opinion of the court. It is axiomatic that where an act is susceptible of two constructions, one good and the other bad, the good

is preferred to the evil. *Odiosa non præsumuntur*—Odious things are not presumed. (Burr. Sett. Cas., 190.)

If the question of Wisherd's ability to borrow money is material herein, then attention is called to the testimony of Wisherd on that point, which testimony the court seems to have overlooked. Speaking of the way in which Bilby paid him for the land in question, Wisherd says:

Q. You can state about when you did receive the consideration, whether it was in cash or what way.

A. I received it shortly after the sale of the land in credit on my indebtedness with Mr. Bilby.

Q. About how much were you owing him at that time?

A. I can't give that accurately, but to the best of my recollection I was owing J. S. Bilby and the bank of J. S. & J. E. Bilby & Co. about one hundred twenty-four or five thousand dollars, principal due J. S. Bilby. That is the best of my recollection. (See printed record, page 163.)

On cross-examination Wisherd testified:

Q. For what did you become indebted to Mr. Bilby in the sum of over $100,000?

A. It was for the purchase money of lands that I bought of him, together with accumulated interest and money furnished at different times for the improvement of the lands, and for notes that he had bought from other parties, and money furnished for cattle, and accumulation of debts for a series of years.

Q. How many years?

A. Running as far back as 1884, and possibly further; might have been some notes older than that.

Q. What became of the land out of which this indebtedness arose?

A. The majority of it went back to him. (See printed record, page 168.)

It also appears from the bill of intervention of Susan B. Alden, together with the certified copy of the judgment in Alden v. Wisherd, and the pleadings in that case, that Wisherd was able to further secure credit to the extent of $20,565.90, making a total of $145,565.90 indebtedness,

which Wisherd was able to secure exclusive of his indebtedness to Cheney, after declaration of forfeiture in 1884. (See printed record, page 12; also stipulation, pages 303 to 312.) In Nebraska this is an enormous indebtedness for an individual to acquire, and no man with an impaired credit is able to do so.

It is evidently true that the execution of the quitclaim deed from Wisherd to Bilby, on February 13th, 1889, had for its object the defeat of Susan B. Alden, executrix, who had recovered a judgment against Wisherd for $20,565.90. This may fairly be taken as the motive for the irregular attempt to transfer the interest of Wisherd to Bilby.

In the light of this testimony it is fair to assume that the learned circuit court of appeals failed to consider the maxim, *Contra veritatem lex nunquam aliquid permittit*—The law never suffers anything contrary to truth (Coke's 2d Inst., 252), and has not given force to the maxim, *Non efficit affectus nisi sequatur effectus*—The intention amounts to nothing unless some effect follows. (1 Rolle, 226.)

For the reasons presented in the petition and this brief, and for many others apparent in the record, the petitioner submits that the writ of certiorari should issue herein.

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